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DEPARTMENT
OF LAW

Expanding Access to Justice

An exploration of large firm pro bono practice
across Europe

Lamin Khadar

Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

Florence, 24 May 2019

European University Institute
Department of Law

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I confirm that a portion of chapter 6 (pgs 292 – 294) draws upon an earlier chapter I published in a co-edited volume: Alemanno, Alberto, and Lamin Khadar, eds. *Reinventing Legal Education: How Clinical Education is Reforming the Teaching and Practice of Law in Europe*. Cambridge University Press, 2018.

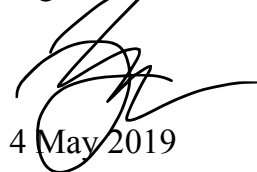
I confirm that this thesis draws upon two earlier reports that I published:

Khadar, Lamin. *The Growth of Pro Bono in Europe: Using the Power of Law for the Public Interest*. Global Network for Public Interest Law (PILnet). DLA Piper, 2016.

Khadar, Lamin et al. *The Good Lobby Legal Needs Survey 2016 – Final Report*. The Good Lobby, 2016.

I confirm that a revised analysis of portions of Chapters 3, 4, 5 and 6 of the PhD will be forthcoming as part of a co-authored chapter (with Ed Rekosh) in “Global Pro Bono” (title TBC), an edited volume on pro bono to be published in 2019 by Cambridge University Press (Cummings, Scott, Louise Trubek and Fabio De Sa e Silva (eds.)). Equally small parts of the analysis in Chapter 3 (in particular related to the early social welfare state in Germany) emerge from conversations with Ed Rekosh in preparation of the above referenced chapter.

Signature and date:



4 May 2019

Expanding Access to Justice: an exploration of large firm pro bono practice across Europe

PhD thesis, written by Lamin Khadar, European University Institute, 2019

Summary

This PhD thesis explores pro bono practice among large, international law firms in Europe. The central question addressed by the thesis is: *does “Big Law Pro Bono” contribute to access to justice in Europe?* The thesis commences with a review of the literature which both contextualizes and situates the thesis. This review also identifies gaps in the existing literature particularly related to the globalization and localization of law firm pro bono and its practice beyond the United States (i.e. its practice in other parts of the world such as Europe, Asia, Africa and Latin America). After identifying issues with the current definition of access to justice, used throughout much of the existing literature, the thesis proposes a new definition which is then used throughout the thesis to evaluate pro bono practice in Europe. Towards this end, the thesis first provides historical context to law firm pro bono practice by exploring the history of pro bono, legal aid and other models of progressive lawyering across Europe. Following this, the thesis closely explores the process by which large firm pro bono practice arrived in Europe (i.e. globalization), the contemporary practice and the process by which it adapted to the European legal, social and political ecosystem (i.e. localization).

Ultimately, it is suggested that large firm pro bono does not contribute to access to justice in Europe insofar as access to justice is defined narrowly - in the way that it has been conceived of in much of the existing literature. However, by embracing a broader definition of access to justice, it is possible to perceive the actual (and possible) social and political impact of large firm pro bono practice in Europe.

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INTRODUCTION

On the 31st of January 1990, just 11 months before the collapse of the Soviet Union, McDonalds opened its very first restaurant in Russia. Located in Moscow, on the famous Pushkin Square, when the restaurant opened its doors, there was already a crowd of over 5000 Muscovites – and others travelling from further afield – waiting to taste their first Big Mac. The restaurant had expected to serve 1000 people that day but ultimately welcomed over thirty thousand Soviet Citizens.

Reflecting on this anecdote, it is worth recalling that, between 1990 and the year 2000, the period that followed the fall of the Berlin Wall and during which the Soviet system collapsed, but before the rise of China, the United States was, for a short period, the only genuine Super Power in the World. In this period, the US economy made up over 40% of the global economic growth – over 25% more than either the European Union or Japan and over 30% more than China. Expressing the feelings of many in the West at the time, it was in 1992 that Francis Fukuyama famously predicted “the end of history”; the emergence of a new world order premised on the spread of liberal democracy and free market capitalism around the world.

Indeed, this was a period of unprecedented globalization, with intense integration within capital and product markets internationally. This was a period during which foreign assets as a percentage of world GDP almost doubled and the use of mobile phones and the internet became increasingly commonplace. This was a period during which the number of multinationals surged and a period that witnessed some of the largest corporate mergers of all time (e.g. Exxon and Mobil or America Online and Time Warner).

It is perhaps unsurprising then, that this was also the period during which the world’s largest law firms – mainly US firms but also some London firms made up of hundreds of thousands of lawyers – rapidly internationalized, opening offices across the globe. Chicago-based Baker & McKenzie sought to become the largest law firm in the world, with the most lawyers and offices in 32 countries worldwide by 1993. Rival firms dubious of Baker’s “franchise” model, dubbed the firm “McLaw”. In the years that followed, these critics would have to eat their words as several major law firms followed in the footsteps of Baker & McKenzie.

Europe was the first part of the world to see a major influx of American law firms. Why Europe? While the countries of Western Europe experienced a period of virtually uninterrupted economic growth between the late 1980s and the early 2000s as they became increasingly integrated, for the countries of Central and Eastern Europe, this was a period of rapid privatization, the lowering of trade barriers and a flood of foreign direct investment. No less than eight former socialist states were preparing to join the European Union and public and private funding was flowing into the region along with new concepts and ideals, such as democracy, the rule of law and civil liberties.

The American law firms were simply following their clients and the markets and echoing the developments within the broader global economy. However, and crucially for this thesis, as they internationalized, they were not only exporting commercial legal services. Like the private foundations and development agencies whose attentions were also turning to parts of Europe at this time, they were exporting American culture and ideals, amongst which the practice of “Big Law Pro Bono”. That is, a model of social change lawyering that can trace its origins to the United States and to progressive legal movements of the 1960s and 1970s, a model that involves the provision of legal services at no cost, and for the public good (but typically for the benefit of low-income individuals), by lawyers working at large commercial law firms. This practice, and particularly its European variant, is the central concern of this PhD thesis.

Like the Big Mac then, in the 1990s and early 2000s, Big Law Pro Bono became available in parts of the world where it had not previously existed. However, unlike the Big Mac, there were no long queues of locals waiting for it upon its arrival. To the contrary, very few locals had ever heard of it, even fewer were excitedly anticipating its arrival, and sometimes its reception would be blatantly hostile. Also, unlike the Big Mac, as the “exporters” and “franchisees” of Big Law Pro Bono would discover, it would be necessary to significantly alter the product to make it marketable (or sometimes even palatable) in Europe. While the global success of McDonalds is often attributed to its consistency, the global success of Big Law Pro Bono, as we shall explore, may in fact depend on its adaptability and variability. Herein lies the central line of enquiry for this thesis: does Big Law Pro Bono need to take the same shape in Europe as it took in the United States in order to succeed? For the purposes of this thesis, this central line of inquiry will be framed in the following terms: *does “Big Law Pro Bono” contribute to access to justice in Europe?* As we shall come to see, answering the second

question will go a long way to providing the answer to the first. To answer this question, the thesis explores a series of related points:

- What is “access to justice”?
- What is “pro bono”?
- What is “Big Law Pro Bono”
- How did Big Law Pro Bono originally emerge in the US and how and why did it arrive in Europe?
- To what extent does Big Law Pro Bono in Europe differ from Big Law Pro Bono in the US and why?
- What are the antecedents of Big Law Pro Bono in Europe, how do they relate to access to justice and what role have they played in shaping Big Law Pro Bono in Europe?

In a nutshell, the thesis will explore the emergence of a unique variant of large firm pro bono (i.e. Big Law Pro Bono) in Europe, one not focused on individual legal assistance to low-income clients, akin to the model of Big Law Pro Bono that has been institutionalized in the United States, but rather, focusing primarily on providing technical and policy assistance to European human rights and policy non-governmental organizations (NGOs) often working transnationally. The thesis will map the contours and institutionalization of this variant of Big Law Pro Bono, explain why it has emerged and explore the ways in which it contributes to access to justice in Europe. As we shall see, the reasons for the emergence of this unique variant of Big Law Pro Bono in Europe are largely structural (related both to the capabilities and interests of those who were involved in transplanting and promoting Big Law Pro Bono in Europe and also to the context in which it was being transplanted), but also cultural (related to the unique manner in which European legal systems have developed, in contrast to the US legal system). A key empirical claim will be that Big Law Pro Bono in Europe does not, meaningfully, contribute to access to justice as this concept (i.e. *access to justice*) has broadly been understood by the literature to date. However, this is not to say that it does not contribute to access to justice at all. Rather, if we take a broader view of what access to justice means, a view deriving from more intuitive understandings of that phrase, rather than from the existing literature on pro bono, then we can perceive how Big Law Pro Bono is and can contribute, not insignificantly, to access to justice in Europe.

The thesis is divided into six chapters. In the following pages, I will briefly introduce each of the chapters.

Chapter 1 – Big Law Pro Bono as Social Change Lawyering: A Review of the Literature

In the first chapter of the thesis, the central objective will be to explore the existing literature and situate the thesis within the wider field of study. Four key suggestions will be made. Firstly, it will be suggested that the object of study, Big Law Pro Bono (rather than merely “pro bono” – meaning lawyers acting outside of the Big Law setting providing free legal services), originates from the United States, both factually, as a practice, and conceptually, as subject of academic literature. With respect to the factual source, the chapter explores the history of public interest lawyering in the United States and, in particular, the public interest law and poverty law movements that gripped progressive legal circles in the United States between the 1960s and 1970s. Some of the very first large law firm pro bono programs will be explored along with the reasons for their emergence. With respect to the conceptual source, it will be suggested that this can be traced to the American sociological and legal literature that resulted directly from the public interest law movement. This body of literature which, at the outset was largely policy-oriented work commissioned by the private foundations playing central roles in the movement (such as the Ford Foundation) has, over the years, transformed into a significant body of scientific, socio-legal literature with several sub-categories, among which a smaller body of literature on pro bono. It is necessary to trace these factual and conceptual origins of Big Law Pro Bono in order to better understand the specific orientation of the present thesis, the key point being that Big Law Pro Bono in Europe is but the European manifestation of a model of legal practice that was developed during a specific historical and political era in the United States. That Big Law Pro Bono has even come to be practiced in Europe is but the consequence of the internationalization of very large American law firms (firms with more than 500 lawyers) between the 1990s and early 2000s, and through this process, the globalization of a uniquely US model of progressive legal practice.

The second claim in Chapter 1 is that the academic enterprise of studying pro bono only meaningfully took off after the mid-1990s, at precisely the time when Big Law Pro Bono was being institutionalized in the largest of American law firms. Consequently, much of the literature on “pro bono” is primarily literature on “Big Law Pro Bono” in America. It was these

very same large, elite law firms that rapidly internationalized throughout the 1990s and early 2000s and so, by studying this phenomenon in Europe, the thesis is only really concerned with Big Law Pro Bono (i.e. pro bono practiced in very large international law firms, those with more than 500 lawyers).

Thirdly, it will be suggested that the existing body of literature on pro bono which – for the reasons alluded to just above is largely American in origin and focus – has been framed around several common themes. These include: the causes and origins of pro bono, the internal organization and structure of pro bono, law firm rationales for pro bono (or the so-called “business case for pro bono”), the actors and roles within the pro bono universe including pro bono clients and problems or issues with pro bono as a means of effectively delivering legal services to clients. These themes are explored in Chapter 1 and the key findings from the literature, along with several open questions, are set out. I will suggest that the central gaps in the literature relate to globalization and localization of Big Law Pro Bono and the role played by intermediary actors (i.e. clearinghouses connecting law firms with pro bono clients) in these processes.

Finally, it will be suggested that because Big Law Pro Bono emerged in the United States, it is contingent and context-bound. To this end, throughout the thesis, I will be aiming to separate out which aspects of Big Law Pro Bono are applicable in the European context and which are applicable only in the US context. In the first Chapter, I will begin to unpack one of the central fault lines between US and European Big Law Pro Bono practice, which, as we shall explore, is the empirical and normative orientation of Big Law Pro Bono in the US towards “access to justice” (understood narrowly as civil legal aid). That is, the idea, widely held by academics and practitioners alike, that Big Law Pro Bono is and should be a solution to the so-called (civil) “justice-gap”.

Chapter 2 – Revisiting Access to Justice and Big Law Pro Bono: Analysis and Method

In Chapter 2, the central focus will be on providing definitions for some of the key concepts explored throughout the thesis – namely, “access to justice”, “pro bono” and “Big Law Pro Bono” – and on setting out the methodological approach that has been employed in researching this thesis.

A central claim, first made in Chapter 1, and then further developed in Chapter 2, is that the definitions of “access to justice” used in the Big Law Pro Bono literature are very narrow, typically referring only to access to lawyers or legal services for low-income individuals. Often, this definition is narrower still, referring essentially only to civil legal aid. It will be suggested that this is a consequence of the historical and political context within which conversations on access to justice have emerged in the United States in the past 50 years or so. The result is that Big Law Pro Bono in the United States has been oriented functionally, both empirically and conceptually, towards the provision of civil legal aid.

In this chapter, it will be suggested that, for the purposes of this thesis, a much broader definition of access to justice will need to be developed in order to be able to perceive and evaluate the potential and actual impact of Big Law Pro Bono in Europe. Accordingly, a broader definition of access to justice is developed, both by borrowing from the work of John Rawls and Scott Cummings and by embracing several “everyday”, commonplace notions of what access to justice means by drawing on popular literature and the speeches of public figures. This expanded definition incorporates and moves beyond the narrow definition of access to justice typically employed in the pro bono literature. It responds to criticisms of such narrow conceptions of access to justice by including both procedural and substantive elements. Finally, as just alluded to, the definition provides an evaluative framework for Big Law Pro Bono in Europe.

Chapter 2 is also used to provide working definitions of “pro bono” and “Big Law Pro Bono” which can then be used throughout the remainder of the thesis. The rest of the chapter sets out the thesis methodology, which combines qualitative, quantitative, historical and anthropological research tools. Data collection involved desk-based research, participant observation, interviews, surveys and archival research.

Chapter 3 – Precursors to Big Law Pro Bono: A History of Pro Bono and Social Change Lawyering in Europe

In Chapter 3, commencing from the premise established in Chapter 1 that Big Law Pro Bono is a historically and politically contingent social institution, I will explore the context into which Big Law Pro Bono was transplanted in Europe. In other words, I will explore the

precursors to Big Law Pro Bono in Europe in terms of the models of pro bono and social change lawyering that have emerged throughout European history.

This chapter pulls together empirical accounts from several important secondary sources, shedding light on pro bono lawyering in Europe from Classical times up until the year 2000 (approximately the point at which Big Law Pro Bono began to be practiced in Europe). The chapter also relies on a mixture of archival research, secondary sources and several interviews to tell the story of more recent forms of social justice lawyering and pro bono practice in Europe that emerged during the second half of the 20th Century during the European civil liberties, human rights and public interest law movements.

The review undertaken in this chapter will be framed by the definition of pro bono articulated in Chapter 2, and the practices identified will be evaluated against the definition of access to justice also set out in Chapter 2. The chapter will explore how the rationales for pro bono have changed throughout the ages, from communal solidarity, civic duty, kinship and patronage and aristocratic honor in Ancient Athens and Republican Rome, to charitable and professional duty and social contract theory in the Middle Ages, Early Modern Era and 20th Century. It will be suggested that, throughout European history, there has been a consistent and growing concern with access to justice (defined narrowly as the access of the poor and the needy to legal services and to procedures for administering justice) and that access to justice, defined in this way, has been the major objective of pro bono practice throughout the ages in Europe. However, with the emergence of nation states and then the European social welfare state, the obligation of ensuring access to justice gradually shifted from a charitable or professional duty of lawyers and the organized bar, towards a constitutionalized civic right, institutionalized in the form of state-funded legal aid systems. In this way, parts of the legal professions of Europe increasingly specialized in the provision of legal services to low-income and lower-income parts of the population on a remunerated basis, freeing other parts of the profession from their historic and honorific duty to ensure access to justice.

The chapter will also explore how new models of social justice lawyering emerged in the late 20th Century, which both embraced and transcended conventional public service norms (neutrality, impartiality) that were implicit in much of the pro bono lawyering practice throughout European history, and fused them with both human rights frames and political and transgressive ideologies that had been cultivated in Soviet-era Central and Eastern Europe.

These models of social justice lawyering do not pursue access to justice, defined narrowly, but are oriented at norm change and deploy pro bono to this end.

This chapter will provide us with the necessary background context to begin exploring when, how and why Big Law Pro Bono was transplanted in Europe. Without understanding this background context, it will not be possible to make sense of the manner in which Big Law Pro Bono has come to be practiced in Europe today.

Chapter 4 – The Emergence of Big Law Pro Bono: An Investigation of How Big Law Pro Bono has Come to Exist in Europe and the Shape it has Taken

In Chapter 4, we explore the globalization of Big Law Pro Bono¹ by investigating how Big Law Pro Bono came to exist in Europe and the shape that it has taken in this new context. In this chapter, I trace the process by which Big Law Pro Bono travelled from the United States to Europe between the 1990s and early 2000s and then sketch the institutional features of Big Law Pro Bono in Europe today and discuss to what extent it diverges from its American forbearer.

After quickly recapping the story of Big Law Pro Bono in the United States (specifically focusing on how it came to be institutionalized and structurally oriented towards the provision of civil legal aid to low-income individuals), the chapter will explore the process by which US and London-based firms pursued different strategies of internationalization within Europe (something that would come to have a bearing on the model of Big Law Pro Bono in Europe). The chapter will touch upon the reception of Big Law within the European legal market, which was not always positive, and would often be mimicked in the reception of Big Law Pro Bono. I will illustrate that the institutionalization of Big Law Pro Bono Practice in the United States and the internationalization of Big Law created much of the necessary infrastructure for Big Law Pro Bono practice in Europe (at least on the supply-side). The chapter will also explore how Big Law Pro Bono got started in London, which, as the first European destination for Big Law Pro Bono practice, also became somewhat of a base camp for the transplanting of Big Law Pro Bono in Continental Europe. We will see that, unlike in the United States, and due to

¹ Of course, it is important to note that, while this thesis explores the globalization and localization of large firm pro bono practice in Europe, the phenomenon is now also taking shape in Latin America, Asia, Africa etc. and so this this thesis only represents one part of the puzzle in the study of global Big Law pro bono.

resistance largely from the firms themselves, Big Law Pro Bono in London was initially developed in a way that largely excluded the provision of legal services to low-income individuals. Cuts to state-funded legal aid, rather than resulting in the firms taking on work for low-income individuals, resulted instead in the firms lobbying the government to maintain legal aid spending. It will be suggested that the orientation of Big Law in London, away from direct individual access to justice work and towards work for non-profits would set the tone for the development of Big Law Pro Bono across the Continent and was one, among a number of reasons, for the distinct model of Big Law Pro Bono that evolved in Europe.

The chapter will then go on to explore the model of Big Law Pro Bono practiced across Europe today (i.e. including Western, Central and Eastern Europe and Central Asia – wherever the firms maintain offices). The findings are based on research carried out during my period of participant observation and archival research at the global headquarters of the Global Public Interest Law Network (“PILnet”) in New York, several interviews with pro bono managers and NGO employees throughout Europe and beyond and two surveys carried out among pro bono managers with responsibility for the European offices of international law firms and EU-oriented NGOs based in Brussels. I explore the internal organization and structure of Big Law Pro Bono in Europe. I do so by focusing on the law firms themselves and on the key actors beyond the firm and their roles including the pro bono clients and the types of work that are carried out for these clients and, finally, on the clearinghouses. The objective is to build on the existing literature by exploring to what extent the globalized or Europeanized form of Big Law Pro Bono differs from the US model. It will be suggested Big Law Pro Bono in Europe is characterized by weak institutionalization mimicking many of the features of Big Law Pro Bono in the US, however, with at least one major difference being the virtually exclusive non-profit client base both from the point of view of the firms and the clearinghouses (or intermediaries).

Chapter 5 – Big Law Pro Bono in Search of Demand and Ideology: An Investigation of Why Big Law Pro Bono Has Taken a Unique Shape in Europe

Having established, in Chapter 4, that Big Law Pro Bono in Europe has a near exclusive orientation towards non-profit clients (typically NGOs engaged in human rights and/or European policy work), in Chapter 5 we will explore why this is the case. The chapter begins by making several important suggestions based on findings from the previous chapters. Firstly,

it is suggested that where Big Law Pro Bono is transplanted to a new region or jurisdiction, the prevailing historical and political context and the various local actors/stakeholders are likely to play a significant role in determining how the resource is deployed and we should not necessarily expect that the results would be the same as in the United States (given that the local context will be significantly different). Secondly, it is suggested that, whereas certain features of Big Law Pro Bono are likely to be context-transcending and present in any region or jurisdiction where Big Law Pro Bono is deployed, others are likely to be more context-specific and variable depending upon the specific location. I suggest that whether a feature falls into the former or the latter category likely depends upon whether that feature flows from the logic of Big Law itself (such as the structures, processes and hierarchies of large commercial law firms or the preferences of multinational corporate clients) or from the logic of the local legal market (such as local Bar regulations or the prevailing system for the provision of legal services to the poor).

Following this, the chapter goes on to explore two important and related “why” questions. Firstly, why it is that Big Law Pro Bono in Europe is focused so single-mindedly on work for non-profit organizations. In the second part and secondly, why, given the history of pro bono lawyering in Europe (explored in Chapter 3), and the way Big Law Pro Bono has come to be understood in the US (explored in Chapters 1, 2 and 4) is there virtually no observable (or no significant) focus on direct individual access to justice in the European variant of Big Law Pro Bono? Several possible contributing answers to these questions are suggested, including: barriers to market access experienced by the initial Big Law Pro Bono exporters/transplanters in Europe; the unique profile and networks of those actors who initially developed the market for Big Law Pro Bono in Europe; the legacies of the European civil liberties, human rights and public interest law movements; the resistance of local bars to Big Law engaging in individual client work; the specificities of the type of law firms and lawyers that make up the European Corporate Bar; the relative ease of dealing with non-profit clients as opposed to individual clients; the functional distribution of labor between the Social Bars of Europe and the rest of the legal profession (and the Corporate Bar in particular); and the fact that the problem of individual access to justice (in Central and Eastern Europe) had, in the minds of many of the relevant stakeholders, already been largely solved by the time the market for Big Law Pro Bono was really taking shape on the Continent.

Ultimately, what the analysis in this chapter hopes to demonstrate is that while the globalization of Big Law Pro Bono is a process of globalizing and transplanting a common institutionalized set of law firm features and practices, the process of localization of these institutionalized practices must not be overlooked and has the power to transform and re-purpose them, creating novel models of Big Law Practice.

Chapter 6 – Does Big Law Pro Bono contribute to access to justice in Europe? Can it?

Having established that Big Law Pro Bono in Europe has taken a unique shape, contrasting with its US forbearer, and having investigated why that is the case, in the final chapter of the thesis, I explore what all this means. In other words, what are the consequences of the way that Big Law Pro Bono has developed in Europe vis-à-vis access to justice? If, as is claimed in this thesis, Big Law Pro Bono in Europe does not significantly (or even meaningfully) contribute to access to justice (in the way that access to justice has typically been defined), then does it perhaps contribute to access to justice more broadly, as defined in Chapter 2? Throughout the chapter, we evaluate Big Law Pro Bono and assess its actual and possible contribution to access to justice, defined in four ways (as elaborated in Chapter 2), i.e. the definition within the existing literature on pro bono, the “narrow definition” and the “wide definition”.

In this chapter, it is suggested that, in relation to the definition of access to justice currently embraced by the US pro bono literature, Big Law Pro Bono does not contribute to access to justice insofar as possibly less than 15% of Big Law Pro Bono work in Europe involves providing legal services directly to low-income individuals. Within the other definitions, it is suggested that Big Law Pro Bono does and can make varying levels of contribution to access to justice in Europe whether in the form of: expanding access to legal services for non-profit organizations and so redistributing valuable resources away from private corporations and towards public interest; directly facilitating NGOs to engage in law and policy reform work aimed at norm change; or providing moral education to an increasingly elitist portion of the European legal profession.

The hope, with this final chapter, is to sketch the possible contribution of Big Law Pro Bono to access to justice in Europe and so provide a normative agenda for Big Law Pro Bono on the Continent which is purposefully distinct from the American variant of Big Law Pro Bono.

Conclusion

In conclusion, at the core, the key themes to be explored in this thesis may shed light on some of the central gaps in the existing literature on pro bono. Many of these gaps in the literature concern the globalization of Big Law Pro Bono as an institutionalized set of practice and functional roles. For example, what is the relative role played by globalizing and localizing forces where Big Law Pro Bono is exported beyond the United States? How might local legal, political and social contexts impact the form that pro bono takes? What other factors might account for variation in the way in which pro bono is institutionalized and deployed in new contexts?

Ultimately, the “McLaw” moniker applied to Baker & McKenzie in the 1990s is deceptive. While McDonalds essentially exported the same product across the globe, Baker & McKenzie was effectively a network of national law firms each providing legal services within the national legal markets, i.e. German lawyers engaged in German law, Spanish lawyers engaged in Spanish law and Polish lawyers engaged in Polish law. Even firms that pursued different models of internationalization, i.e. sending small numbers of American lawyers to European cities, largely to serve US clients, still could not completely avoid interaction with the local legal system, particularly if they sought to develop pro bono practice (thus requiring them to adapt to the local market place). For Big Law Pro Bono, this distinction is crucial. Any interaction with the local legal system has the power to radically alter not only the nature of the legal service being provided, but beyond the for-profit context, also the very nature of the activity (i.e. the make-up of the primary client base and the central objectives being pursued). While it is too early to conclude whether the Big Law Pro Bono transplant has been a success in Europe, this thesis suggests that we likely need to closely investigate what “success” means before commencing such an analysis. What is clear at present is that Big Law Pro Bono does not contribute to access to justice in Europe, if we understand this to mean the provision of pro bono legal assistance to low income persons (in the way that this has been understood in the US). If this is the criteria by which we measure success, then Big Law Pro Bono in Europe is unquestionably failing; a view espoused by some in the pro bono movement (particularly pro bono professionals from American and Australia). However, once we become cognizant of the legal and political context in Europe (both in terms of the prevailing legal aid systems, the structure of the European bars, the prevalent models of progressive legal advocacy and the

unique policy and legislative ecosystem) we can begin to perceive the ways in which Big Law Pro Bono might contribute to access to justice in Europe.

CHAPTER 1 – Big Law Pro Bono as Social Change

Lawyering: A Review of the Literature

As set out in the introduction, the central research question of this PhD thesis is: *does “Big Law Pro Bono” contribute to access to justice in Europe and if not, could it?* In this first chapter, the central objective is to explore the existing literature and situate the present thesis. Critically, this chapter aims to establish a number of important points that will help to frame the overall thesis.

Firstly, it is crucial to understand that my object of study, Big Law Pro Bono (rather than merely “pro bono” – meaning lawyers acting outside of the Big Law setting providing free legal services), originates in the United States both factually, as a practice, and conceptually, as a subject of academic literature. The factual source can be traced back to the public interest law movement that gripped progressive legal circles in the United States between the 1960s and 1970s, which itself emerged from early legal and political activism in the US in the first half of the 20th century. Meanwhile, the conceptual source can be traced to the American sociological and legal literature that resulted directly from the public interest law movement. This body of literature, which started out as a largely policy-oriented stream has, with the passage of time, transformed into a deep river with several major tributaries each genuinely scientific and sociological in its own right. In this first chapter, it will be important to briefly trace these factual and conceptual origins of Big Law Pro Bono in order to better understand the specific orientation of the present thesis. What should become apparent is that, what I aim to study, Big Law Pro Bono in Europe, is but the European manifestation of a model of legal practice that was developed during a specific historical and political era in the United States. That Big Law Pro Bono has even come to be practiced in Europe is the consequence of the internationalization of very large American law firms (more than 500 lawyers), and through this process, the globalization of a uniquely US model of progressive legal practice.

Secondly, it is important to understand that the academic enterprise of studying pro bono emerged primarily from the very same body of literature on public interest law that got underway in the 1970s. Although there were fleeting papers on pro bono in the 80s and 90s, the study of pro bono only really got underway between the mid 1990s and the early 2000s,

which, not by chance, was the period when pro bono practice was being significantly institutionalized in the largest of American law firms. Consequently, much of the literature on “pro bono” is primarily literature on “Big Law Pro Bono”. For my purposes, this is key. As will be explored in Chapter 3, it was naturally the largest US law firms that internationalized, opening offices all across Europe, and so by studying pro bono in Europe, I too am really only talking about Big Law Pro Bono (pro bono practiced in very large international law firms, with more than 500 lawyers).

Thirdly it should be noted that the existing, and largely American, literature on pro bono has been framed around a number of common themes including the causes and origins of pro bono, the internal organization and structure of pro bono, law firm rationales for pro bono (or the so-called “business case for pro bono”), the actors and roles within the pro bono universe including pro bono clients and problems or issues with pro bono as a means of effectively delivering legal services to clients. These themes were, for the most part, already presented in the early studies on pro bono in the 1970s and have given shape to the academic research into pro bono in the subsequent years. My own thesis does not depart dramatically from these themes and, rather, applies them to the European context. The literature review in this chapter thus seeks to identify gaps in the existing literature in the hope of carving out spaces for new research both within the confines of this thesis and beyond.

Finally, and most importantly, it must be recognized that, given that the practice of Big Law Pro Bono emerged in the United States, it is contingent and context-bound. Consequently, a major aim of this chapter, and this thesis, is to separate out which aspects of the practice of Big Law Pro Bono are applicable in the European context and which are applicable only in the US context. It is hoped that this will be an important contribution to the literature. Toward this end, a major theme which this chapter and this thesis will zero in on, is the empirical and normative orientation of Big Law Pro Bono in the US towards access to justice (understood narrowly as civil legal aid) i.e. the idea that Big Law Pro Bono is and should be a solution to the so-called (civil) “justice-gap”. This is an orientation embraced both by practitioners and by academics. In exploring whether Big Law Pro Bono contributes to access to justice in Europe, this theme will need to be thoroughly interrogated, and specifically, its relevance and applicability in the European context.

In what follows, I intend to set the scene for my thesis by first establishing my broader research territory and highlighting some of the key academic literature to date (section 1) and, thereafter, identifying and establishing the importance of my narrower research territory and exploring key themes in the existing literature and some of the major findings (section 2). I will then explore some biases and gaps in the existing literature related to my narrower research territory (section 3).

1 The Context of Social Change Lawyering

The National Association for the Advancement of Colored People (NAACP) was founded in 1909 in a context of worsening racial relations in the US following the civil war, including race riots, a rise in lynching of African-Americans and the spread of new Jim Crow and voting disenfranchisement laws.² Meanwhile, the American Civil Liberties Union (ACLU) was founded in 1916 in a context of growing concern around US involvement in the First World War and the heavy-handed use of espionage and sedition laws by government to prosecute conscientious objectors.³ These organizations did not start out as lawyer's organizations; formed by socially or politically influential individuals, they focused instead on lobbying government bodies.⁴ They mobilized against state-sanctioned repression carried out against social pariahs (e.g. Blacks, prisoners, dissenters).⁵ Nevertheless, their advocacy often focused on law reform if not exclusively on litigation. Between the 1920s and 1950s, these organizations began to more consistently and effectively deploy litigation as an advocacy tool. For example, they began to take high profile 'test cases' to the more progressive federal courts typically making moral (i.e. not technical) arguments that emphasized the gap between the broadly read normative commitments of the constitution and the lived experience of the relative end-beneficiary group.⁶

² Carle, "Race, class, and legal ethics," 103.

³ Rabin, "Lawyers for social change," 210.

⁴ See Carle, "Race, class, and legal ethics," 104; and Clark, "Sincere and Reasonable Men?" 513–37.

⁵ Rabin, "Lawyers for social change," 222.

⁶ For example, Thurgood Marshall, in closing arguments in *Brown* professed that: "a finding for segregation would be an inherent determination that the people who were formerly in slavery, regardless of anything else, should be kept as near that stage as is legally possible. And now is the time, we submit, that this Court should make it clear that that is not what our Constitution stands for." See *Brown v. Topeka Board of Education* 347 U.S. 483, 74 S.Ct. 686, closing arguments.

The aim was to reverse engineer the constitution in order to secure favorable precedents leading to rule change (usually the voiding of a statute on the basis of its unconstitutionality) or the establishment of new rights that expand the scope of legal protection afforded to the beneficiary-group. Class action lawsuits were thus used to bring claims on behalf of groups of individuals that may set precedents for the benefit of the broader end-beneficiary group or 'client community'. Test cases were also used to generate media attention and public sympathy, raise funds and boost membership.⁷

An example of one of the early NAACP test cases may serve to illustrate.⁸ In 1922 Charles Garland, a student at Harvard College (and son of a Wall Street stockbroker), donated \$800,000 (approximately \$9 million, today) to establish a private foundation dedicated to radical social reform. The foundation, in turn, donated one eighth of that amount, to the NAACP. The money was not given with no strings attached, but was to be used for the employment of a special counsel to study the legal status of African Americans and to plan a legal campaign aimed at improving the social and economic conditions of African Americans. This resulted, four years later, in a number of carefully selected test cases challenging the exclusion of Black students from American law schools as unconstitutional.⁹

The first such test case was *University v. Murray*.¹⁰ On January 24, 1935, Donald Murray applied to the University of Maryland School of Law. Murray met the standards for admission to the law school in all respects; however, his application was declined on the grounds of his race. He was informed that, "*The University of Maryland does not admit Negro students and your application is accordingly rejected.*" Murray first appealed the rejection decision to the board of education. However, having no luck there, Murray with the help of a Black student fraternity, Alpha Phi Alpha, initiated a law suit against the University. The NAACP decided to get involved, seeing an opportunity to argue the case in such a way as to set a precedent exposing the hypocrisy of the 'separate but equal' doctrine that held sway at the time. The iconic Black public interest lawyer (and later, Supreme Court Judge) Thurgood Marshall, of the NAACP argued that:

⁷ Rabin, "Lawyers for social change," 215; Carle, "Race, class and legal ethics," 100; see, for example, Endersby and Horner, *Lloyd Gaines*," 65–67.

⁸ Tushnet, "NAACP's legal strategy against segregated education", 1 - 21.

⁹ Greenberg, "Crusader in the Court," 217.

¹⁰ 169 Md. 478, 182 A. 590 (1936) (No. 53).

*"[The] actions of the Respondents violated the Fourteenth Amendment to the Constitution of the United States, in that they amounted to a denial to...a citizen of the United States... of the equal protection and benefit of the law, as secured to him by ... the laws of the land."*¹¹

And he went on to stress that:

*"What is at stake here is more than the rights of my client. It is the moral commitment stated in our country's creed."*¹²

The case was won and the Court ordered Maryland Law School to admit Murray. The case had garnered positive in-depth coverage from the African American press from beginning to end.¹³ Following such early tastes of success, throughout the 1940s and 1950s the NAACP went on to win several other high profile cases related to segregation in education, the electoral process and public transport.¹⁴ Such success stories, of course including the iconic decision of *Brown v. Board of Education*,¹⁵ litigated by the NAACP legal fund, inspired generations of lawyers and also philanthropists who began to believe in *law* more broadly (rather than just litigation) as a tool for positive social change.

The two decades following the success in *Brown* bore witness to a range of coordinated efforts by legal elites to deploy law to bring about progressive social transformation. These included not just impact litigation but also a range of other efforts. For example, in the early 1960s, the Ford Foundation funded pilot neighborhood law offices in order to demonstrate how civil legal aid could operate.¹⁶ These offices became a form of prototype for the Organization of Economic Opportunities Legal Services Program (OEO). Meanwhile in the 1970s Ralph Nader, Human Rights Watch and others, began to deploy legal research, fact-finding and lobbying alongside litigation to highlight the unaccountability and *Kafkaesque* inaccessibility

¹¹ *University v. Murray*, Petition of Mandamus, filed at the Baltimore City Court by Thurgood Marshall, April, 18, 1935, paragraphs 141 to 152, accessed December 2, 2013, <http://msa.maryland.gov/megafile/msa/speccol/sc2200/sc2221/000024/000004/000001/pdf/c174-2.pdf>.

¹² Appellant's Brief, *University v. Murray*, 169 Md. 478, 182 A. 590 (1936) (No. 53).

¹³ Farrar, *Baltimore Afro-American*, no. 185, 54.

¹⁴ See, for example, *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938); *Smith v. Allwright*, 321 U.S. 649 (1944); *Shelley v. Kraemer*, 334 US 1 (1948); *Sweatt v. Painter*, 339 U.S. 629 (1950); or *Brown v. Board of Education* 347 U.S. 483 (1954).

¹⁵ *Brown v. Board of Education* 347 U.S. 483 (1954).

¹⁶ Menkel-Meadow, "Legal Aid," 38.

of various US administrative agencies or to "address violations of the laws of war" and "influenc[e] the conduct of American foreign policy".¹⁷

Reflecting on this period, commentators have suggested that between the 1960s and 1970s the US bore witness to a "public interest law movement". That is, a "court-centered and litigation-based" liberal legal advocacy movement.¹⁸ The original aim, inspired by the NAACP victories, was to leverage the US federal courts, prepared to use broad powers of judicial review (especially to protect vulnerable minorities), to outmaneuver rogue and non-compliant state and local lawmakers and enforcers who practiced an institutionalized politics of organized racial violence.¹⁹ Later, as the movement spread to environmental and consumer law and international human rights, it began to leverage the power of federal bureaucracies (e.g. the Environmental Protection Agency) to sanction various market actors or leverage political influence with the US state department to apply pressure on foreign governments abusing human rights.²⁰

It has been well documented that the movement was largely spearheaded and constructed by a group of private foundations (especially the Ford Foundation, which played a very important role) and elite lawyers.²¹ Louise Trubek, for example, discussing the role of the Ford Foundation, as one of the key founders of the movement notes that, in the effort to tackle economic and social inequality, a strategic choice was made to place "public interest law as a cornerstone in state-society relationships... The imagination of the founders, combined with the amount of monies expended, created a well-thought out vision of how to create a major set of institutions that could expand the roles of lawyers and place them in central positions in the dynamic changes taking place in American society."²² Foundations chiefly operated by

¹⁷ Rabin, "Lawyers for social change," 225; Neier, *International Human Rights Movement*, 204–05.

¹⁸ Trubek, "Public Interest Law," 418; Trubek, "Crossing boundaries," 457–60.

¹⁹ Cover, "Origins of judicial activism," 1303–08.

²⁰ Cummings and Trubek, "Globalizing public interest law," 1–53.

²¹ See Council for Public Interest Law, *Scales of Justice*, 81–82; Weisbrod, Handler, and Komesar, *Public Interest Law*; Trubek, "Public Interest Law," 418; Trubek, "Crossing boundaries," 457–60.

²² Trubek, "Public Interest Law," 418.

allocating grants to purpose-built or sometimes pre-existing NGOs whose task would be to carry out public interest law advocacy in relation to a narrowly defined set of issues.²³

In turn, this period of unprecedented legal activism, inspired a great deal of scholarly attention and reflection. Indeed, there is by now a very large literature on what might be broadly termed social change lawyering.²⁴ Such literature is largely, but not exclusively, US-oriented and straddles the legal and sociological disciplines. This literature is centrally concerned with studying the deployment of law as a positive force for social change and the lawyers engaged in this practice.

At the outset, when this literature first emerged in the late 1960s and throughout the 1970s, it was chiefly concerned with defining what exactly the practice of “public interest law” (the term originally preferred to describe what I refer to as social change lawyering) was, theoretically, organizationally and practically, and with making the normative case for its existence in the US legal and political landscape.²⁵ Early definitions of public interest law included:

“[...] efforts to provide legal representation to interests that historically have been unrepresented and underrepresented in the legal process. These include not only the poor and the disadvantaged but ordinary citizens who, because they cannot afford lawyers to represent them, have lacked access to courts, administrative agencies, and other legal forums in which basic policy decisions affecting their interests are made. Public interest lawyers have tried to provide systematic representation to these excluded

²³ Foundations were involved in sponsoring or setting up all of the following: Center for National Policy Review; Lawyers’ Committee for Civil Rights Under Law; Legal Action Center; Mexican-American Legal Defense and Education Fund; NAACP/LDEF; National Committee Against Discrimination in Housing; Native American Rights Fund; Puerto Rican LDEF; Women’s Law Fund; Women’s Rights Project; Natural Resources Defense Council; Center for Law and Social Policy; Center for Law in the Public Interest; Citizen’s Communications Center; Education Law Center; Environmental Defense Fund; Institute for Public Interest Representation; International Project; League of Women Voters Education Fund; Legal Action Center; Public Advocates; Sierra Club Legal Defense Fund; (Bogota, Colombia) Research Center for the Defense of Public Interests. See Roelofs, “Foundations and Collaboration,” 487.

²⁴ Understood broadly here to include both the literature on “public interest law” and on “cause lawyering.” See, for example, (re: public interest law) Rabin, “Lawyers for social change,” 207–61; Weisbrod, Handler, and Komesar, *Public Interest Law*; Cooper and Dhavan, *Public Interest Law*; Cummings and Trubek, “Globalizing public interest law”; Rekosh, “Constructing Public Interest Law”; Trubek, “Public Interest Law”; Cummings, “Pursuit of Legal Rights”; Albiston and Nielsen, “Funding the Cause.” See also (re: cause lawyering) Sarat and Scheingold, *Cause Lawyering*; Sarat and Scheingold, *Cause Lawyering and the State*.

²⁵ See Berlin, Roisman, and Kessler, “Public interest law,” 674; Halpern and Cunningham, “New Public Interest Law,” 1095; Rabin, “Lawyers for social change,” 207–61; Weisbrod, Handler, and Komesar, *Public Interest Law*.

individuals and groups in order to assure that their interests are understood and acknowledged by decision-makers.”²⁶

“[S]ubsidized attorney services [...] afforded in the absence of market demand - undertaken primarily to promote either substantive or procedural systemic goals.”²⁷

“[Activity] (1) undertaken by an organization in the voluntary sector, (2) that primarily involves the use of legal tools such as litigation, and (3) that produces significant external benefits if it is successful in bringing about change.”²⁸

Such definitions were largely rooted in notions of market failure with respect to the provision of legal services and the resulting limits on access to legal and administrative fora. These definitions were also notably broad in that they sought to capture a very large range of:

1. *institutionalized organizational practices*, (including legal aid, pro bono among the private bar, clinical legal education at law schools and full-time social change lawyering practiced within both the for-profit sector – so-called “Public Interest Law Firms” – and the voluntary and non-profit sector – e.g. the Center for Law and Social Policy or the Natural Resources Defense Council);
2. *substantive issues* (from equal protection of the poor and marginalized groups, to the promotion of diffuse interests such as consumer and environmental protection); and
3. *legal tools/strategies/services* (from impact litigation, law reform and lobbying to direct individual legal representation, legal advice and community organizing).

Ultimately, such definitions, and the entire scholarly enterprise of studying “public interest law” as a theoretically coherent, institutionalized set of legal practices, collapsed²⁹ (although it has been recently revived)³⁰ due to criticisms from the left and the right in relation to the meaning and practice of public interest law.³¹ Conservative critics questioned whether the

²⁶ Council for Public Interest Law, *Scales of Justice*.

²⁷ Rabin, “Lawyers for social change,” 227.

²⁸ Weisbrod, Handler, and Komesar, *Public Interest Law*, 42.

²⁹ Cummings, “Pursuit of Legal Rights,” 521.

³⁰ See, for example, Cummings and Eagly, “After Public Interest Law,” 1251; Cummings and Trubek, “Globalizing public interest law”; Cummings, “Future of public interest law,” 355; Trubek, “Public Interest Law”; Cummings, “Pursuit of Legal Rights”; Albiston and Nielsen, “Funding the Cause.”

³¹ Cummings, “Pursuit of Legal Rights,” 519, 520.

procedural and systemic change brought about by public interest lawyering could genuinely be claimed to be in the interests of the public at large: “environmental regulation could have the effect of reducing jobs, or consumer regulation could increase prices”.³² They also questioned what qualified as an “unrepresented” or “underrepresented” group (small business owners? Poor whites? Crime victims?) and what qualified as an underrepresented cause (what about conservative causes such as the right to life?).³³ Meanwhile, on the left, critics questioned, sometimes devastatingly, whether public interest lawyering was ultimately effective in achieving the sought-after social change and to what extent the practice further marginalized the marginalized groups it sought to benefit (e.g. was it elitist? Was it led by the lawyers or by the community?).³⁴

Consequently, from the mid 1990s, in the place once occupied by “public interest law”, scholarly attention moved towards a new research agenda with a new label: “cause lawyering”, which focused foremost on the *motivations, ideology and politics and cultural contexts* of lawyers pursuing social change and only secondarily, on the practice and organization of such efforts.³⁵ Rather than being rooted in notions of market failure and inequality in access to legal and administrative processes, cause lawyering was defined in contrast to conventional lawyering:

“The objective of the attorneys that we characterize as cause lawyers is to deploy their legal skills to challenge prevailing distributions of political, social, economic, and/or legal values and resources. Cause lawyers choose clients and cases in order to pursue their own ideological and redistributive projects. And they do so, not as a matter of technical competence, but as a matter of personal engagement [...] They have no qualms about embracing the values and goals of those whom they represent. Indeed, they take pride in thus challenging traditional concepts of professionalism. At least in principle, then, cause lawyering stands in sharp and self-conscious contrast to traditional conceptions of lawyering, according to which attorneys are expected to provide case-by-case and transaction-by-transaction service to particular clients

³² Ibid., 519.

³³ Ibid. See also Southworth, “Conservative lawyers,” 1223.

³⁴ Cummings, “Pursuit of Legal Rights,” 520; see also Bell, “Serving two masters,” 470; Scheingold, *Politics of Rights*; Rosenberg, *Hollow Hope*.

³⁵ See Sarat and Scheingold, *Cause Lawyering*; Sarat and Scheingold, *Cause Lawyering and the State*; Scheingold and Sarat, *Something to Believe In*; Sarat, *Worlds Cause Lawyers Make*; Sarat and Scheingold, *Cause Lawyers and Social Movements*.

without reference to either their own or to their clients' values, policy preferences and political and social commitments".³⁶

Unlike its predecessor, cause lawyering was politically neutral (liberals *and* conservatives could be cause lawyers),³⁷ it could be practiced all over the globe and was thus stripped of its US orientation and institutional and cultural contexts.³⁸ It was less prescriptive and more ambiguous about both the beneficiaries and the ultimate objectives of the practice. However, in time, cause lawyering attracted its own critics; the "big tent" approach raised questions about where to draw the line. Could corporate attorneys who believed that their legal practice "advanced a beneficial version of market capitalism—or of legal professionalism" also be characterized as cause lawyers, and more problematically, could/should lawyers pursuing illiberal causes (e.g. so-called "traditional marriage" i.e. one man, one woman) be considered as morally equivalent to lawyers pursuing liberal and progressive causes?³⁹

More recently, since the mid 2000s, and on the basis of dissatisfaction with the amorphous and slippery nature of the cause lawyering construct, a rebooted literature on public interest law has surfaced led, among others, by Scott Cummings and Louise Trubek.⁴⁰ Cummings and Trubek have sought to revive, restore and update some of the early work on public interest law from the 1970s. Benefiting from the passage of time, the authors are able to cast a more disinterested eye on the public interest law enterprise. By acknowledging the overtly political and liberal nature of the project, accepting its flaws and limitations and abstaining from making any universalist normative claims of their own, they manage to subtly sidestep some of the previous controversies. From this vantage point, public interest law is conceived of structurally and organizationally as a set of significantly institutionalized and networked legal practices, including, inter alia, "foundation-supported nonprofit organizations, bar-sponsored groups, federally funded legal services organizations, public defender offices, law school clinics, pro bono departments within large corporate firms, and smaller scale for-profit legal offices engaged in public interest work".⁴¹ Such institutionalized practices are understood to have

³⁶ Sarat and Scheingold, *Cause Lawyering and the State*, 13.

³⁷ Sarat and Scheingold, *Cause Lawyering*, 25, n. 13.

³⁸ See, for example, Sarat and Scheingold, *Cause Lawyering and the State*.

³⁹ Cummings, "Pursuit of Legal Rights," 521, 522.

⁴⁰ See Cummings and Eagly, "After Public Interest Law," 1251; Cummings and Trubek, "Globalizing public interest law"; Cummings, "Future of public interest law," 355; Trubek, "Public Interest Law"; Cummings, "Pursuit of Legal Rights"; Albiston and Nielsen, "Funding the Cause."

⁴¹ Cummings and Eagly, "After Public Interest Law," 1252.

clearly originated from distinct US liberal legal, cultural and political moments and their associated ideologies (e.g. the civil rights movement, the public interest law and poverty law movements, the human rights movement and the rule of law movement).⁴² Moreover, such institutionalized practices are understood as being deliberately constructed, typically by elite architects often with the support of private philanthropy or political institutions.⁴³

Distinct from the previous scholarly conceptions of public interest law, in the 21st century, such institutionalized practices can and have been deployed *globally* as but one strand in the diffusion of American legal practices and ideologies and the significant American penetration of international and global legal and political institutions, processes and modes of governance. Ultimately, the central argument of Cummings and Trubek is that public interest law (as the globalized form of a distinct set of uniquely American legal practices), is taking shape as a global institution with a common set of understandings and practices which take root in diverse national political and economic environments thus introducing an element of novelty in each context. Public interest law thus becomes a mechanism of global governance.⁴⁴

In terms of the shape of this globalized form of public interest law, the authors suggest that it involves a number of key legal practices or models of progressive lawyering (including the use of impact litigation, pro bono and legal clinics), is often transnational and legally pluralistic (taking place across borders, within multiple jurisdictions and both domestic and international advocacy venues) and tactically flexible (involving not only litigation but also, education, policy lobbying, media and communications).

Ultimately, the authors conclude that more needs to be known about the process by which public interest law is being globalized. Specifically, the authors ask, “how do legal reform projects strike a balance between importing outside exemplars of public interest law and promoting indigenous traditions”, and suggest that “we still know little about the ideology of lawyers who operate in the transnational arena, the strategic calculations and political values that shape their advocacy”.⁴⁵

⁴² Ibid., 1252, 1253; see also Cummings and Trubek, “Globalizing public interest law,” 8.

⁴³ Trubek, “Public Interest Law,” 1, 2; Cummings and Trubek, “Globalizing public interest law,” 3, 4; Rekosh, “Constructing Public Interest Law.”

⁴⁴ Ibid., 27.

⁴⁵ Ibid., 53.

The present thesis emerges out of this new literature on the globalization of public interest law and tackles many of the core questions arising from this literature such as those referred to just above. However, the present thesis takes a deep dive into just one of the legal practices referred to by Cummings and Trubek, namely, Big Law Pro Bono.

From within the broad and diverse literature on social change lawyering discussed above, a specific literature on “pro bono” has emerged, significantly taking shape in just the past 15 years. The pro bono literature straddles all major branches of the literature on social change lawyering, borrowing equally from each. It is to this body of literature that my thesis primarily seeks to contribute.

In the following section, I will explore the meaning and significance of pro bono and some of the key themes and findings from this body of literature.

2 From US Pro Bono to Globalizing Pro Bono

What is “pro bono”? In common parlance, “pro bono” has become something of a term of art, implying the provision of professional services (typically legal services) by the private bar, at no cost (and typically for no remuneration) to clients of low income (who may not be able to afford such services otherwise). In practice, pro bono is typically defined along the lines of the American Bar Association definition under ABA Model Rule 6.1 (i.e.):

“legal services [provided] without fee or expectation of fee to: (1) persons of limited means or (2) charitable, religious, civic, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means”⁴⁶

⁴⁶ See ABA Model Rule 6.1: Voluntary Pro Bono Publico Service, https://www.americanbar.org/groups/probono_public_service/policy/aba_model_rule_6_1. The definition also includes: “(1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate; (2) delivery of legal services at a substantially reduced fee to persons of limited means; or (3) participation in activities for improving the law, the legal system or the legal profession.”

In his seminal 2004 paper “The Politics of Pro Bono”, Scott Cummings suggests that, throughout most of American history, pro bono legal services were provided in a sporadic and ad hoc fashion, typically on an individual basis out of a sense of professional charity. However, between the 1980s and the early 2000s, pro bono, particularly as practiced by large elite US corporate law firms (Big Law), has been rationalized and significantly institutionalized. Cummings suggests that “[p]ro bono has thus emerged as the dominant means of dispensing free representation to poor and underserved clients, eclipsing state-sponsored legal services and other nongovernmental mechanisms in importance.”⁴⁷ Cummings pointed out that organized pro bono programs accounted for nearly one half of the staff available to provide free services to the poor, as compared with federally funded programs, which accounted for approximately one-quarter.⁴⁸ Subsequent studies suggested that it is more likely that pro bono accounts for between one third and one quarter of the full-time lawyer equivalent staff within the US civil legal aid system.⁴⁹ In any event, this is a significant contribution certainly worthy of scholarly attention, particularly given the public policy implications. As Richard Abel has noted, “[t]here is something very strange about having privileged lawyers - who earn huge incomes by acting for large corporations and wealthy individuals - constitute a major source of legal representation for the poor and subordinated.”⁵⁰

Moreover, since the early 2000s, as US (and increasingly also London-based) commercial law firms have globalized, so too has the practice of pro bono. Already in his 2004 article Cummings noted that “[d]riven by the internationalization of law firm practice and the different constraints faced by legal services infrastructures in countries around the world, pro bono initiatives have recently begun to emerge more vigorously outside of the United States' borders, cropping up in places like Paris, China, Latin America, and Eastern Europe.”⁵¹ This gave rise to the prospect of the global institutionalization of pro bono, something that, the literature suggests, is in fact coming to fruition, at least in places like the United Kingdom⁵² and

⁴⁷ Cummings, “Politics of pro bono,” 1.

⁴⁸ *Ibid.*, 104.

⁴⁹ Sandefur, “Lawyers’ Pro Bono Service,” 80; Cummings and Rhode, “Managing pro bono,” 2367.

⁵⁰ Abel, “Paradoxes of Pro Bono,” 2443.

⁵¹ Cummings, “Politics of pro bono,” 96.

⁵² See, for example, Boon and Whyte, “Charity and Beating,” 169–91.

Australia,⁵³ and possibly even, although more slowly, in emerging/emergent economies such as Brazil⁵⁴, Singapore⁵⁵ and India.⁵⁶

Given these developments, a flourishing body of literature has emerged to study this phenomenon from multiple angles. Chiefly, to date, the literature has sought, at various times, (1) to make the normative case for pro bono⁵⁷ (2) to try and understand pro bono from a structural and organizational perspective⁵⁸ and (3) from a cultural, social and political perspective⁵⁹ and (4) to make recommendations for its improvement as a form of legal service provision to the poor.⁶⁰

In what follows I will discuss some of the major themes and findings emerging from the literature under two headings: (1) pro bono as “institution” or “praxis” and (2) pro bono as “culture”, “ideology” or “symbol”. In the final section of this chapter, I will discuss another major theme emerging from the literature that is of critical important to my thesis, i.e. the ultimate function of pro bono/ pro bono as a solution to the access to justice problem, and I will then conclude by identifying the contribution that I hope to make.

2.1 Pro bono as “institution” or “praxis”

The idea of studying pro bono as an institution or as praxis, that is to say, as a distinct set of organizational practices, policies, protocols, actors/roles, rationales, objectives, functions and outcomes, first emerged from the early literature on public interest law in the 1970s.⁶¹ Joel Handler and his colleagues were the first academics to attempt to systematically investigate pro bono among the American private bar in general and among large, elite law firms in

⁵³ See Bartlett and Taylor, “Pro bono lawyering,” 273; Twomey and Corker, “Pro bono at work,” 255–60.

⁵⁴ De Sa e Silva, “Doing well and doing good.”

⁵⁵ Whalen-Bridge, “Pro Bono in Singapore,” 97–143; Maguire, Shearer, and Field, “Reconsidering pro bono,” 1164.

⁵⁶ Gupta, “Pro Bono,” 275.

⁵⁷ See, for example, Katzmann, *Law Firm and Public Good*; Rhode, “Pro bono in principle,” 413–64; Justus, “Using Business Strategies,” 365; or Glazer, “Revisiting the Business Case,” 563.

⁵⁸ See, for example, Handler, Hollingsworth, and Erlanger, *Pursuit of Legal Rights*; Spaulding, “Prophet and Bureaucrat,” 1395–434; Cummings and Rhode, “Managing pro bono,” 2357; or Boutcher, “Private Law Firms,” 543–64.

⁵⁹ See, for example, Rhode, “Cultures of Commitment,” 2415; Epstein, “Stricture and structure,” 1689; Dinovitzer and Garth, “Pro bono as elite strategy”; Boutcher, “Rethinking Culture,” 108; or Boutcher, “Lawyering for social change,” 179–96.

⁶⁰ See, for example, Cummings and Rhode, “Managing pro bono,” 2357; Sandefur, “Lawyers’ Pro Bono Service,” 79–112; and Boutcher, “Private Law Firms,” 543–64.

⁶¹ See, for example, Handler, Hollingsworth, and Erlanger, *Pursuit of Legal Rights*.

particular. Handler studied pro bono empirically, using surveys and interviews to identify the percentage of private bar lawyers doing pro bono work, how many hours they did per year, the types of clients they were representing, the types of legal matters they were engaging with, the percentage of work done during billable vs. non-billable hours, major areas of practice by reference to city size, percentage of time spent with low-income clients, the amount and type of pro bono relative to the size of the firm, the types of pro bono work and the wealth of clients relative to the wealth of the pro bono lawyers.⁶² In relation to large firms, Handler and his colleagues studied the extent to which they had formalized pro bono policies in place, the degree to which pro bono practice was coordinated, how programs were structured and the types of clients that were represented.⁶³ Already in the 1970s, Handler and his colleagues discovered that, among lawyers in the private bar, large US law firm lawyers were carrying out the greatest amount of pro bono work during their non-billable hours.⁶⁴ Handler further identified at least 24 large firms that had formalized pro bono programs.⁶⁵ These consisted of institutionalized organizational features that were geared towards engaging the firms' lawyers, on a voluntary basis, with public interest work. The most common features of such programs were: i) a "pro bono committee", i.e. a group of lawyers tasked with identifying and reviewing potential pro bono cases; ii) a system for assigning individual lawyers to pro bono cases; iii) a formal commitment from the firm to release lawyers for pro bono work; and/or iv) the firm maintained a separate office for pro bono work.⁶⁶ Interestingly, but perhaps unsurprisingly, pro bono programs were found typically in the largest firms and the largest cities where those firms maintained offices.⁶⁷

This first empirical study of pro bono has arguably set the course for how pro bono has been studied by academics in the decades that have followed. While the study did not thoroughly explore various academically interesting questions about how and why pro bono was being practiced, and while they took for granted that normatively, pro bono *should* exist and *was* in the public interest, they did a thorough job of mapping the terrain and defining empirically what pro bono was.

⁶² Ibid., 91–110.

⁶³ Ibid., 123.

⁶⁴ Ibid., 105.

⁶⁵ Ibid., 123.

⁶⁶ Ibid., 123, 124.

⁶⁷ Ibid., 123.

In the years that have followed, scholars have continued this line of inquiry, updating and supplementing the work of Handler and his colleagues. Key themes across this body of literature include: the causes and origins of pro bono, the internal organization and structure of pro bono, law firm rationales for pro bono (or the so-called “business case for pro bono”), the actors and roles within the pro bono universe, including pro bono clients and problems or issues with pro bono as a means of effectively delivering legal services to clients. In the following paragraphs, I will explore these themes.

2.1.1 Causes and origins

There are many suggestions in the literature as to the causes or origins of pro bono although some consensus does emerge. The first wave of pro bono institutionalization, in the 1960s and 1970s is believed to have been triggered in response to market pressures with respect to recruitment.⁶⁸ As discussed above, the so-called “public interest law” and “poverty law” movements of the 1960s and 1970s saw the emergence of a range of models of social change lawyering. Law firms apparently feared or perceived that graduates from America’s best law schools (exactly the kind of graduates that were sought after by elite law firms) were increasingly drawn to careers in public interest law rather than careers in commercial law. Commentators suggest that, facing stiff competition, large commercial law firms began to establish pro bono practices to entice the best graduates to a career in commercial law.⁶⁹ In the words of one commentator:

*“There was a widespread perception that elite graduates would not opt for big firms unless they developed programs that provided opportunities to engage in pro bono. As a result, the number of formalized pro bono programs expanded.”*⁷⁰

The second wave of pro bono institutionalization is said to have occurred between 1980 and into the early 2000s. Multiple trigger factors have been identified in the literature including: restrictions placed on the activities of federally funded legal aid lawyers in the 1970s (to limit law reform work, thus creating a demand/opportunity for such work to be carried out by pro bono lawyers);⁷¹ the large decline in federal funding on civil legal aid throughout the 1980s

⁶⁸ Ibid.

⁶⁹ Ibid., 123; Cummings, “Politics of pro bono,” 33–35; Boutcher, “Lawyering for social change,” 181.

⁷⁰ Cummings, “Politics of pro bono,” 35.

⁷¹ Ibid., 21.

and 1990s;⁷² the activities of the ABA to promote pro bono throughout the 80s and 90s,⁷³ (including the introduction of a rule on pro bono in 1983 and an aspirational pro bono target of 50 hours for every lawyer in 1993); internal and external criticisms to the profession (particularly from government) on the basis that it had become too business-oriented and lost its professional norms;⁷⁴ the emergence of a strong voluntarist agenda from the first Bush administration in the late 80s and subsequently a growing interest in volunteerism and Corporate Social Responsibility (CSR) among large US and British corporations (i.e. law firm clients, who in turn placed pressure on the firms to establish their own CSR programs);⁷⁵ the use of rankings systems by legal journals to comparatively (and publicly) rate the pro bono commitment of elite firms (again, placing pressure on law firms to improve their pro bono performance in order to effectively recruit);⁷⁶ rapid expansion in firm size (leading to challenges in: managing potential conflicts of interest with respect to informal pro bono work; keeping lawyers busy during down periods; and finding suitable training opportunities for young lawyers – all of which creating pressures towards the rationalization of law firm pro bono programs);⁷⁷ and threats to the profession caused by deregulation of the legal services market and the potential entrance into the market of non-lawyers providing traditional legal services (e.g. wills and estates planning, corporate legal services, etc.), arguably placing pressure on the profession to curry favor with regulators.⁷⁸

Despite this multitude of internal and external trigger factors suggested by the literature, recent large empirical studies based on significant comparative data suggest that some factors may be more important than others in motivating law firms to embrace and institutionalize pro bono. The most significant factors appear to relate more to perceived and actual internal and external threats to the firms' business (individually or collectively) and business incentives, rather than, for example, to internal organizational dynamics related to law firm growth or the activities of

⁷² Ibid., 19–21; Cummings and Rhode, “Managing pro bono,” 2367–68; Boutcher, “Lawyering for social change,” 181; Sandefur, “Lawyers’ Pro Bono Service,” 103; Abel, “Paradoxes of Pro Bono,” 2444.

⁷³ Cummings, “Politics of pro bono,” 7, 18; Cummings and Rhode, “Managing pro bono,” 2368–70. For an opposing position, suggesting that Bar activities have a weak impact on firm pro bono activity, see Sandefur, “Lawyers’ Pro Bono Service,” 102.

⁷⁴ See, generally, Katzmman, *Law Firm and Public Good*; Boon and Whyte, “Charity and Beating,” 180, 181.

⁷⁵ Cummings, “Politics of pro bono,” 28; Boutcher, “Rethinking Culture,” 124; Boutcher, “Private Law Firms,” 549–58; Boon and Whyte, “Charity and Beating,” 186, 187.

⁷⁶ Cummings, “Politics of pro bono,” 40; Cummings and Rhode, “Managing pro bono,” 2370–72; Boutcher, “Rethinking Culture,” 127.

⁷⁷ Cummings and Rhode, “Managing pro bono,” 2364–67, 2409–19; Boutcher, “Private Law Firms,” 555–59.

⁷⁸ See, generally, Sandefur, “Lawyers’ Pro Bono Service,” 79–112.

bar organizations. For example, in her 2007 study Rebecca Sandefur identified that perceived threats to lawyers from non-lawyer competitors in the provision of legal services correlated with higher rates of pro bono participation whereas the recruitment and promotional activities of state bar organizations did not.⁷⁹ Meanwhile, in two articles published in 2010 and 2017, Steven Boucher found that “the desire to recruit effectively, the pressure to attract clients, and the rise of external ranking systems” acted as strong influences on law firm behavior, encouraging firms to further institutionalize their pro bono practices and increase their participation rates.⁸⁰ Boucher further suggests, on the basis of his findings, that “many large firms may rationalize pro bono as an important signal of their professional status and legitimacy within the profession rather than as oriented toward internal organizational goals”.⁸¹

Among these factors, i.e. competition from non-lawyers, pressure to recruit the best students, pressure to attract clients and external ranking systems, at least two appear to be significantly context-bound. We cannot expect, without further investigation that elite students in other parts of the world would select law firms based on available pro bono opportunities. Equally, we cannot necessarily anticipate that lawyers faced with competition from non-lawyers in other parts of the world would turn to pro bono as a way to raise their professional status vis-à-vis regulators, rather than some other strategy. While we could anticipate that if rankings systems were effective in the US, they might be effective elsewhere, that would also depend on an understanding of why rankings systems matter to law firms, something about which the literature has revealed very little to date. In terms of law firm clients though, given that clients across the largest law firms globally are remarkably similar (in so far as they are mainly large multinational corporations spanning a range of sectors) we could anticipate that trends in the US would be repeated elsewhere in the world, and indeed there are some early indications in the literature that pressure from clients to engage in pro bono has arisen beyond the US, for example in Brazil and the UK..⁸² Perhaps, as pro bono globalizes, pressure from clients to engage in CSR will prove to be one of the major external drivers of global pro bono institutionalization.

⁷⁹ Ibid., 102.

⁸⁰ Boucher, “Rethinking Culture,” 124–27; Boucher, “Private Law Firms,” 549–58.

⁸¹ Boucher, “Private Law Firms,” 544.

⁸² Boon and Whyte, “Charity and Beating,” 187; de Sa e Silva, “Doing well and doing good,” 16.

One remarkable gap in the literature is any thorough interrogation of the idea, put forward by many,⁸³ that increased pro bono institutionalization is directly linked to declines in the provision of government legal aid. There is remarkably little evidence in the literature of any causal relationship to this effect. It is perhaps more likely that, rather than there being any significant causal relationship between the supply of legal aid and the supply of, or demand for, pro bono, legal aid cuts and the legal and political debates and narratives that surround such cuts, create a background context against which pro bono – which I will argue in this thesis is inherently ideologically empty and functionally adaptable – takes shape. Such a hypothesis would predict that, in the absence of legal aid cuts and the political and legal context created by such cuts, pro bono might take on a different ideological and functional form. It is hoped that by interrogating this idea in this thesis, although indirectly, and related to Europe, some further light might be shed on this theme.

2.1.2 Internal organization and structure

With respect to the internal organization and structure of pro bono, the literature revolves around two sub-themes: the process of institutionalization and the features and models of institutionalization. Regarding the process, this has been a gradual development occurring in waves (as noted above) moving from the drawing up of pro bono policies and the establishment of pro bono committees (made up of volunteer fee-earners), through to the appointment of full-time pro bono roles, the setting of internal targets, specialization on specific areas of law and monitoring and evaluation of growth and impact.⁸⁴ What is also clear is that institutionalization is not possible without buy-in from the leadership of the firm (meaning both the senior partners in key managerial positions but also the rank and file partners across the various practice groups), the setting of goals with some form of accountability and oversight, and allocation of sufficient staffing to the management of the pro bono practice.⁸⁵

In terms of the features of institutionalization, the most reliable and compelling findings come from a large survey of around sixty firms carried out by Scott Cummings and Deborah Rhode,

⁸³ Cummings, “Politics of pro bono,” 19–21; Cummings and Rhode, “Managing pro bono,” 2367–68; Boucher, “Lawyering for social change,” 181; Sandefur, “Lawyers’ Pro Bono Service,” 103; Abel, “Paradoxes of Pro Bono,” 2444.

⁸⁴ See, for example, Handler, Hollingsworth, and Erlanger, *Pursuit of Legal Rights*, 123; Justus, “Using Business Strategies,” 365; Cummings, “Politics of pro bono,” 57–86; Cummings and Rhode, “Managing pro bono,” 2372; Granfield, “Meaning of pro bono,” 113–14.

⁸⁵ Justus, “Using Business Strategies,” 373–75.

the results of which were published in 2009.⁸⁶ This survey updated and expanded upon the survey carried out by Handler and his colleagues in 1973. Cummings and Rhode identified that the most common features of institutionalized pro bono included a pro bono policy (96% of firms); a pro bono committee (93%); the inclusion of pro bono contribution into the performance reviews of lawyers (82%); the inclusion of pro bono hours towards the determination of bonuses (76%); centralized channels for the distribution of pro bono matters (69%); a firm-wide pro bono hours target (66%); approval of all pro bono matters by the pro bono committee (62%); and a full-time pro bono role (61% of firms) which could be either a pro bono partner, a pro bono counsel or a pro bono coordinator (lawyer or non-lawyer).⁸⁷ What is clear is that the number of full-time pro bono roles (whether lawyer or non-lawyer) are on the rise. There were fewer than 20 pro bono roles identified in the US in 1998, more than 70 in the US in 2008 and more than 200 (globally) by 2018.⁸⁸

When it comes to models of institutionalization, while the 1973 study by Handler showed quite some variation between more informal models, where lawyers largely managed their own pro bono practices, and more structured programs such as pro bono branch offices in low-income neighborhoods, or specialized in-house pro bono departments dealing exclusively with certain types of law such as housing law or welfare law, today there seems to be remarkable consistency across models of pro bono practice. One key area of divergence relates to budget, with Cummings and Rhode reporting that just 30% of surveyed firms had a fixed pro bono budget.⁸⁹ Another key area of divergence is around specialization, where firms adopt varying practices to deepen their expertise in particular areas. For example, firms might set up “signature projects” that “focus firm resources on a particular issue, client group, or geographic area [and] are designed to coordinate firm resources around a well-defined goal, create synergies between different practice groups, and build institutional knowledge and resource.”⁹⁰ Or they might make use of externship or secondment programs, rotating lawyers into positions with key non-profit clients for several months.⁹¹ But even here, there seems to be remarkable convergence. Steven Boutcher, in studying the relationship between pro bono and social movements, found that a very large amount of pro bono work (as a proportion of the total

⁸⁶ Cummings and Rhode, “Managing pro bono,” 2380.

⁸⁷ *Ibid.*, 2380–94.

⁸⁸ *Ibid.*, 2373, 2374; see also <https://www.apbco.org/> stating that the Association of Pro Bono Counsel (which requires its members to be in full-time pro bono roles) now has over 200 members globally.

⁸⁹ *Ibid.*, 2390.

⁹⁰ Cummings, “Politics of pro bono,” 72–74.

⁹¹ *Ibid.*, 77.

amount of work) is done for a relatively small number of non-profit organizations and a relatively small number of causes.⁹² Meaning that although there is diversity in the types of issues firms engage with, the bulk of work relates to just a few issues (including children's rights, civil rights and civil liberties and women's rights).⁹³ Meanwhile Cummings and Rhode in their 2009 study found that immigration and children's rights were the most popular focuses among signature projects.⁹⁴ What is as yet unclear from the literature is how specialization and the selection of focus issues interact with the fee-earning work of the firm, with political and social developments or with the processes of globalization and localization. For example, Cummings has noted that "the high concentration of impact-oriented feeder organizations, combined with the historic connection between elite firm lawyers and government service, makes Washington, DC's pro bono culture quite different than that of Los Angeles".⁹⁵ To what extent can we anticipate that such trends might be repeated in other parts of the world, such as Brussels, Geneva or Brasilia, for instance? Or might pro bono in Italy and Greece (or Europe broadly) be more focused on migration related work than in other parts of the world? Conversely, as pro bono is globalized, to what extent would specializations and focus issues developed in New York or DC be expected to be equally embraced by local offices in Warsaw or Sao Paulo? Particularly given that most full-time pro bono roles are based in only a handful of cities (such as New York and DC). Moreover, can we expect firms with very large banking and finance practices to specialize in areas of pro bono work that relate to finance and transactional skills, and can we expect firms with large litigation practices to specialize around strategic and impact litigation?

Ultimately, while we know a great deal about the core features and processes of institutionalization, there remains much to learn about how and why, beyond these core commonalities, firms may differ in their pro bono practices both within the US and globally and how such differences are ultimately manifested. It is hoped that this thesis might make a small but useful contribution to the literature in this regard.

⁹² Boutcher, "Lawyering for social change," 188.

⁹³ Ibid.

⁹⁴ Cummings and Rhode, "Managing pro bono," 2385.

⁹⁵ Cummings, "Politics of pro bono," 90.

2.1.3 Law firm rationales

Moving now to briefly discuss the literature on law firm rationales for pro bono, or the so-called “business case”, the literature identifies several, including: enlightened self-interest in maintaining the reputation of the legal profession (the idea that pro bono work can help to dispel negative narratives about lawyers among the general public);⁹⁶ productivity and organizational slack (the idea that higher revenues and profitability are linked, causally, to higher pro bono hours in so far as keeping lawyers active when they have no fee-earning work may maintain productivity and boost revenues overall);⁹⁷ client development (the idea that not only do corporate clients increasingly demand law firms to engage in pro bono, but also that pro bono can be a good way for firm lawyers to collaborate with and network with corporate clients);⁹⁸ marketing (the idea that pro bono will bring recognition, awards and positive media attention to the firm vis-à-vis the general public but also potential future employees and clients);⁹⁹ recruitment (as mentioned above, the belief that the best law students may select firms on the basis of pro bono opportunities);¹⁰⁰ retention (the idea that pro bono will help to keep lawyers happier and more content in their roles and thus contribute to increased work-satisfaction and ultimately, employee retention);¹⁰¹ professional development and training (the idea that pro bono can be used as a good way to provide junior lawyers with training opportunities and new professional experiences allowing for greater, autonomy and responsibility);¹⁰² and firm integration (the idea that pro bono can help to create a sense of firm culture by allowing lawyers in different practice groups and different offices to collaborate for a good cause).¹⁰³ Note that here I am not discussing the individual motivations of lawyers, which might include a sense of professional or moral duty, but rather the internal economic or organizational rationales of law firms for doing pro bono.

⁹⁶ Katzmann, *Law Firm and Public Good*, 174.

⁹⁷ Epstein, “Stricture and structure,” 1692–94; Justus, “Using Business Strategies,” 366; Cummings and Rhode, “Managing pro bono,” 2409–19; Boutcher, “Private Law Firms,” 555–58.

⁹⁸ Justus, “Using Business Strategies,” 367; Boutcher, “Rethinking Culture,” 124; Boutcher, “Private Law Firms,” 549–58; Boon and Whyte, “Charity and Beating,” 186, 187; de Sa e Silva, “Doing well and doing good,” 16.

⁹⁹ Epstein, “Stricture and structure,” 1692–94; Justus, “Using Business Strategies,” 369; Cummings, “Politics of pro bono,” 125; Boutcher, “Private Law Firms,” 544.

¹⁰⁰ Epstein, “Stricture and structure,” 1692–94; Justus, “Using Business Strategies,” 370; Cummings and Rhode, “Managing pro bono,” 2386.

¹⁰¹ Justus, “Using Business Strategies and Innovative Practices,” 370–71; Cummings and Rhode, “Managing pro bono,” 2386.

¹⁰² Epstein, “Stricture and structure,” 1692–94; Justus, “Using Business Strategies,” 371; Cummings and Rhode, “Managing pro bono,” 2386.

¹⁰³ Justus, “Using Business Strategies,” 372.

Cummings and Rhode in their 2009 article, work hard to try and understand the important question of how such economic, organizational and business rationales interact with the delivery of pro bono services for the poor. Cummings had already noted in 2004 that “economic arguments are often used by well-meaning pro bono advocates in order to convince more bottom-line oriented colleagues to embrace pro bono programs” and that in this way such arguments might be viewed pragmatically.¹⁰⁴ However, Cummings and Rhode reveal that such considerations can and do play a significant role in determining how pro bono programs are structured and in how priorities are set (e.g. to maximize on publicity or training benefits) and, as such, if pro bono is to be taken seriously as a dependable public good, then much more scrutiny of this dynamic is required so that accountability to the beneficiaries of pro bono can be assured. Although Cummings and Rhode do note that firms have many in-built quality control mechanisms that may go some way to counteract business related pressures on pro bono (essentially the same quality-control mechanism they apply to fee generating work).¹⁰⁵ Another very interesting finding from the 2009 study was that, up to a point, the global recession had a significant positive impact on institutionalizing pro bono.¹⁰⁶ As law firms had increased organizational slack, lawyers with no fee-earning work to do were kept busy with pro bono work, often through externship and fellowship programs at non-profit organizations. Equally, Boutcher found that firm revenues and pro bono hours were inversely related, “suggesting that firm leaders channel lawyers into pro bono during lulls in fee-generating work”.¹⁰⁷ Altogether, this suggests a subtle and complex relationship between the business pressures on pro bono and the nature of pro bono as a legal service. Much more research is required to more effectively understand this relationship. For example, to what extent and in which circumstances do business imperatives and service imperatives overlap? In which circumstances, do they dramatically diverge? Moreover, how do such rationales play out beyond the US? Will certain rationales be more or less prevalent across different jurisdictions?

2.1.4 Actors and roles

With respect to the actors and roles in the pro bono universe and the structure and organization of pro bono networks, what is clear is that the institutionalization of pro bono is something that has taken place both within and beyond the law firm, such that institutionalized pro bono

¹⁰⁴ Cummings, “Politics of pro bono,” 114.

¹⁰⁵ Cummings and Rhode, “Managing pro bono,” 2378–80, 2394–405.

¹⁰⁶ *Ibid.*, 2409–19.

¹⁰⁷ Boutcher, “Private Law Firms,” 555–58.

consists of a dense, highly coordinated and collaborative network of actors.¹⁰⁸ This includes “non-profit pro bono intermediaries, bar-sponsored coordinating groups, philanthropic foundations, law schools, monitoring organizations, and referral web sites”.¹⁰⁹

Key themes in this area of the literature relate to who the actors in pro bono networks are, their roles and their relationship to one another and also who pro bono clients are and how and why law firms select their clients (although I will deal with the question of conflicts of interest further below).

The central actors in pro bono networks are the fee-earning lawyers who actually carry out the work, the full-time pro bono staff who coordinate pro bono programs from inside the law firms, so-called “referral organizations” or “clearinghouses” (essentially non-profit organizations whose primary objective is to connect law firms either with other non-profits or with individual clients), so-called “strategic organizations” (i.e. non-profit organizations with separate advocacy goals for whom law firms perform pro bono services) and of course the individual beneficiaries themselves (i.e. poor and marginalized individuals who otherwise would not be able to pay for legal services).

One key finding related to the lawyers themselves is that that it is very often the younger lawyers in the firm, particularly those with higher test scores (GPAs), who are most engaged in the actual pro bono work, and that both women and minority lawyers are significantly more likely to support pro bono work, and in fact do more pro bono work, than men and whites, respectively.¹¹⁰ Other likely persons to get involved in pro bono work have been found to be people who are insulated from vulnerability in firm hierarchy, people with a low stake in the firm, lawyers with a high capacity to work for long hours and lawyers with troughs in work flow.¹¹¹ Cummings and Rhode also found that as the global downturn deepened in 2009, those lawyers who had initially gotten heavily involved in pro bono to keep busy were some of the first to lose their jobs. Consequently, some lawyers began to see engaging in pro bono work as risky and preferred to stay available for billable work.¹¹² It is likely that this kind of dynamic

¹⁰⁸ Cummings, “Politics of pro bono,” 25, 41–46.

¹⁰⁹ Ibid., 145.

¹¹⁰ Handler, Hollingsworth, and Erlanger, *Pursuit of Legal Rights*, 124; Bartlett and Taylor, “Pro bono lawyering,” 260–80; Webley, “Pro bono and young solicitors,” 152–68; Granfield, “Meaning of pro bono,” 130; Dinovitzer and Garth, “Pro bono as elite strategy,” 120–24.

¹¹¹ Epstein, “Stricture and structure,” 1695–97.

¹¹² Cummings and Rhode, “Managing pro bono,” 2415.

(i.e. fear of engaging in pro bono in so far as it might mark one out as not a “team player”) persists in other contexts, for example in firms or jurisdictions where pro bono is less institutionalized. Certainly, it appears that there are perceived and actual risks to engaging in pro bono for lawyers, and how this plays out in any given case likely depends on the firm’s culture, macro and micro economic or business context and the social capital of the relevant lawyer.¹¹³

In terms of the full-time pro bono staff, as already noted, they can be lawyers or non-lawyers and they can be differently situated in the firm hierarchy, from pro bono partners, with equity in the firm, to pro bono counsel, pro bono associates (both formally lawyers in the firm structure), pro bono directors, pro bono managers, pro bono coordinators (formally non-lawyers in the firm structure, although they may still be qualified lawyers) and pro bono assistants or CSR managers (formally non-lawyers, typically with no legal background). A key factor in the emergence of such roles, was the establishment of pro bono rankings systems. As it became increasingly important for firms to monitor and report on their pro bono activities, it was necessary to have a full-time person to coordinate such efforts. Cummings and Rhode suggest that following the introduction of rankings by the American Lawyer magazine, “[p]ro bono participation became a positional good: reputation and recruitment partly depended on how firms stacked up against their competitors [once] some firms began hiring pro bono counsel, others felt pressure to do the same, both to maintain their position and to signal their commitment to public service.”¹¹⁴ In terms of the job descriptions, the literature reveals that the role generally involves a combination of internal coordination of pro bono files (establishing processes, finding and supervising volunteers, internal communications about pro bono), carrying out case work themselves (working on pro bono files related to their areas of expertise), external outreach and client relationship management (working with referral organizations and other non-profits to source pro bono matters for the fee-earners) and external communications (PR, reporting).¹¹⁵ As noted above, there are possibly more than 200 full-time pro bono roles globally today. We do not presently have a complete picture of who these people are (i.e. their CVs,) although Cummings and Rhode surveyed nearly 60 full-time pro bono staff for their 2009 study, finding that most come from within the firm and were previously fee-

¹¹³ See, for example, Dinovitzer and Garth, “Pro bono as elite strategy,” 131, suggesting that undertaking too much pro bono may signal a lack of paying work or lack of fit with the law firm and does not bode well for the future of a young lawyer at a large firm.

¹¹⁴ Ibid., 2373, 2374.

¹¹⁵ Ibid., 2383, 2384; Cummings, “Politics of pro bono,” 60, 61.

earners, while others come from non-profit organizations, where they held legal roles, or from law school legal clinics.¹¹⁶ There are now also many of these roles in London and Australia and a handful in Continental Europe, Asia, Africa and Latin America. It remains to be seen whether the profiles of such persons (internationally) are similar to their US counterparts. One would expect to find persons who have social capital that resonates within Anglo-American legal circles but also some legitimacy vis-à-vis the local legal and public interest context. Although, thanks to Cummings and Rhode, we do understand a bit about how and why such roles are created, we still understand little about variation in the way the function is carried out, particularly across different jurisdictions. Moreover, given that most of these roles are likely to be based in major cities in the US or capital cities elsewhere in the world, what impact does this have on pro bono practice in other locations, and how, why and when might such persons exert more or less power to influence the pro bono practice of an office where they are not based, particularly if it is in a jurisdiction where they are not qualified? Hopefully, this thesis will shed some light on such questions by exploring the few pro bono roles that exist across the UK and Continental Europe.

Surprisingly little research has been done into the referral organizations, which is odd given how critical they are to the pro bono system as a whole. We understand very little about how and why they are formed. Hopefully, the present thesis will do something to rectify this discrepancy. What is known about them, is that in the US they are typically subsidized by local bar organizations and are primarily focused on connecting law firm volunteers to low-income clients.¹¹⁷ They may get involved to a greater or lesser degree in educating clients about the availability of pro bono services, screening pro bono requests from individual clients, liaising directly with full-time pro bono staff, training law firm lawyers and helping to troubleshoot where issues arise in lawyer-client relationships.¹¹⁸ They can be small one-person operations or large complex organizations and they exist across every US state.¹¹⁹ However, many questions remain unanswered: how closely do they work with law firms, to what extent do they have power to set the agenda of law firm pro bono, to what extent do they engage in advocacy vis-à-vis the law firms or the law firm clients, how involved do they get in the matchmaking

¹¹⁶ Cummings and Rhode, "Managing pro bono," 2424.

¹¹⁷ Cummings, "Politics of pro bono," 42.

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

process, to what extent do they specialize as law firms are specializing?¹²⁰ Through a close case study of one such organization this thesis hopes to shed some light on these questions.

We move on now to look at the pro bono clients, including “strategic organizations”, as they have been referred to in the literature and low-income individuals. In terms of strategic organizations, or simply NGOs, some research has been carried out to identify which organizations and which types of issues law firms are engaging with. Cummings defines them as “independent nonprofit groups that have a substantive mandate to pursue a specified advocacy agenda”.¹²¹ Cummings includes within this definition firstly so-called “legal services organizations” (including, for example, legal aid and public defender organizations), whose primary mission is the provision of direct legal services. Secondly, the other type of strategic organization is the “traditional public interest organization” (elsewhere referred to as change-oriented organizations or cause-oriented organizations¹²²) - organizations such as the NAACP or the ACLU (referred to at the top of this chapter).¹²³ The former type of organization (legal services organizations) typically engages with law firms to build up a network of legal volunteers who can take on pro bono matters directly for low-income individuals within the constituency of the relevant organization, be that simply a geographic area or comprised of members of certain groups (e.g. as with faith-based legal services organizations).¹²⁴ Meanwhile, for traditional public interest groups, the objective is to engage pro bono lawyers to “strategically use an array of pro bono relationships - from active co-counseling to more passive pro bono placement - to lessen the burden of large-scale litigation”.¹²⁵ Staff attorneys at such organizations typically act as an intermediate between the pro bono lawyers and the rest of the organization which may be distrusting of commercial lawyers. Larger organizations, like the ACLU may even have in place formal processes for engaging with pro bono lawyers and a range of standardized models for collaborating with them.¹²⁶ A final type of organizational client identified in the literature is the “traditional community organization”.¹²⁷ These include churches, local social groups such as sporting clubs, music clubs and the like.

¹²⁰ For a detailed analysis of Australian referral organizations see Hunt and Burchell, “From conservatism to activism,” 8.

¹²¹ Cummings, “Politics of pro bono,” 45.

¹²² Handler, Hollingsworth, and Erlanger, *Pursuit of Legal Rights*, 101; Boutcher, “Lawyering for social change,” 179–96.

¹²³ Cummings, “Politics of pro bono,” 45.

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*, 46.

¹²⁶ *Ibid.*, 47–49.

¹²⁷ Handler, Hollingsworth, and Erlanger, *Pursuit of Legal Rights*, 101.

For these types of groups, typically, so-called “transactional” or “corporate” pro bono work will be carried out, e.g. incorporation and governance, contracts, intellectual property, employment.

In the 1970s, Handler and his colleague sought to identify how much pro bono work was being done for each type of organization, and in 2013 Steven Boutcher published a paper updating this research.¹²⁸ Excluding the category of individual clients, Boutcher notes that between the 1970 and the present day, the make-up of pro bono clients among large law firms has shifted. While traditional community organizations have reduced from 21% to 14%, change-oriented organizations (i.e. traditional public interest groups like the ACLA or NAACP) have gone up from 36% to 59% and legal services organizations have gone up from 16% to 27%.¹²⁹ Boutcher hypothesizes that as social movements and activism have become an ever-present feature of contemporary Western society, such movements have increasingly professionalized and pursue institutional strategies such as litigation. As such, they gradually penetrate and become embedded in all forms of modern institutional life. Consequently, professionalized cause-oriented organizations are increasingly calling upon pro bono services to more effectively pursue institutional strategies.¹³⁰ As noted above, Boutcher also finds that certain causes and certain organizations dominate the pro bono work carried out by large law firms (typically large, well-established organizations pursuing largely uncontroversial causes). Boutcher hypothesizes that firms may be choosing to act with more institutionalized and established actors and that “it may be that established movements are more likely to have made the important professional connections to key actors within law firms, helping to sustain a constant flow of resources. These relationships themselves become an institutionalized network that channels resources to a small set of actors and thereby crowd out many more organizations that also seek out assistance.”¹³¹ Abel suggests that such established public interest organizations exist in a “symbiotic relationship” with the pro bono practices of large commercial law firms creating a “mutual dependence” which “privileges public interest entities in the few major cities where large firms are concentrated, at the expense of those in smaller cities and rural areas.”¹³² Indeed, Cummings and Rhode found that 75% of the lawyers they surveyed “indicated that they consulted public interest or legal services groups in defining legal needs

¹²⁸ Ibid., 94–101; Boutcher, “Lawyering for social change,” 179–96.

¹²⁹ Ibid., 190, 191.

¹³⁰ Ibid., 181–82.

¹³¹ Ibid., 192.

¹³² Abel, “Paradoxes of Pro Bono,” 2447.

and training lawyers to meet them [and] over half consulted nonprofit partners in identifying special firm wide projects.” This suggests very close relationships perhaps more characteristic of partnership rather than traditional lawyer-client relationships. In spite of such interesting findings and hypotheses, little is known about how such large, institutionalized relationships work in practice, and what the incentives for such relationship are on both sides and how they are sustained. This thesis will hopefully, shed some further light on this.

By far the largest group of pro bono clients in the US are individuals. This group represented more than 50% of the pro bono clientele of large law firms in the 1970s and possibly even more than that today.¹³³ A 2016 survey revealed that 85% of pro bono lawyers had provided services directly to individuals as compared to 35.5% who had provided assistance to organizations.¹³⁴ Meanwhile, a 2012 survey revealed that 70% of lawyers at large firms (i.e. firms with more than 100 lawyers) provided free legal services to persons of limited means in the last year (including advice, representation and mediation) whereas just 42% of such lawyers had provided advice to organizations in the same period.¹³⁵ Moreover, as compared to lawyers at smaller firms, sole practitioners and corporate counsel, lawyers at large firms provided the greatest amount of pro bono legal services to persons of limited means (averaging 77.7 hours per lawyer per year).¹³⁶ Given this status quo, it is remarkable that the literature sheds very little light on the individual pro bono clients of large commercial law firms. We do know a great deal about the kinds of legal services they receive, but virtually nothing about the relationship dynamics (including power dynamics) between commercial lawyers and such individuals, their experience of pro bono legal services, expectations and outcomes and how they interact with referral organizations.

2.1.5 Problems and issues

Looking now at the problems and issues with pro bono as a means of delivering legal services to clients, the literature identifies several significant challenges for pro bono. These challenges are all viewed from the perspective of deploying pro bono as a legal service for low-income individuals or progressive social change. That is to say, they relate to problems and issues with relying on pro bono *as a public good*. The most common issues identified in the literature relate

¹³³ Handler, Hollingsworth, and Erlanger, *Pursuit of Legal Rights*, 125.

¹³⁴ Faith-Slaker, “Supporting Justice,” 8.

¹³⁵ Buczek, Stuth, and Faith-Slaker, “Supporting Access to Justice III,” A-8.

¹³⁶ *Ibid.*, 5.

to: conflicts of interest (the extent to which commercial conflicts prevent firms from engaging in certain kinds of pro bono work);¹³⁷ the broad range of other business imperatives that might take precedence over the public interest or client interests in pro bono work (e.g. recruitment, marketing, business development, training);¹³⁸ the limited expertise of pro bono lawyers engaging in what are sometimes quite complex areas of law;¹³⁹ lack of quality control and concerns around the quality of pro bono work in general;¹⁴⁰ the limited commitment of lawyers to engaging in pro bono work over the long run (i.e. the question of whether pro bono work really is treated in the same manner as fee-earning work);¹⁴¹ unequal power dynamics between pro bono clients and pro bono lawyers;¹⁴² and the question of the real impact or public benefit of pro bono work and the lack of monitoring and evaluation vis-a-vis such impact.¹⁴³

The literature presents a fairly complex understanding of conflicts of interest in the context of pro bono work, which have been said to range from so-called “traditional conflicts” (which arise where a firm seeks to represent a new client whose interests are directly adverse to a current or former client, in a matter against the current or former client); to “direct positional conflicts” (which arise where a firm seeks to represent a new client whose interests are directly adverse to a current or former client, but not in a matter against the current or former client); to “indirect positional conflicts” (which arise where a firm seeks to represent a new client whose interests are broadly or generally adverse to the interests of a current or former client); to “ideological conflicts” (which arise where a firm seeks to represent a new client which a current or former client may find personally or politically objectionable).¹⁴⁴ In relation to pro bono work, it is the positional and ideological conflicts that commentators find the most problematic. Whereas traditional conflicts are quite uncommon in pro bono work, and, in any event, a firm could simply refer a conflicted pro bono client on to another firm, positional and ideological conflicts appear to be somewhat more of a pervasive, systemic issue with pro bono.

¹³⁷ Garth, “Competition to Do Good,” 99; Spaulding, “Prophet and Bureaucrat,” 1395–434; Cummings, “Politics of pro bono,” 116–22; Sandefur, “Lawyers’ Pro Bono Service,” 86, 87; Cummings and Rhode, “Managing pro bono,” 2393.

¹³⁸ Garth, “Competition to Do Good,” 99; Rhode, “Lawyers’ Public Service,” 1435; Cummings and Rhode, “Managing pro bono,” 2434; Abel, “Paradoxes of Pro Bono,” 2445.

¹³⁹ Cummings, “Politics of pro bono,” 148; Rhode, “Lawyers’ Public Service,” 1442.

¹⁴⁰ Rhode, “Lawyers’ Public Service,” 1442–46; Cummings and Rhode, “Managing pro bono,” 2378–79, 2394–408.

¹⁴¹ Rhode, “Lawyers’ Public Service,” 1443.

¹⁴² *Ibid.*, 1444–46; Cummings and Rhode, “Managing pro bono,” 2406.

¹⁴³ Rhode, “Lawyers’ Public Service,” 1449; Cummings and Rhode, “Managing pro bono,” 2378–79, 2401–06.

¹⁴⁴ Spaulding, “Prophet and Bureaucrat,” 1425.

To the extent that, as noted above, certain clients and causes may systematically struggle to attract pro bono support (e.g. related to employment law, labor law and environmental law).¹⁴⁵ The literature suggests that most firms have no written policy on conflicts of interest in relation to pro bono matters (beyond the conflicts policy that exists to identify traditional conflicts in relation to fee-earning work).¹⁴⁶ Consequently, beyond traditional conflicts, the worry is that pro bono conflicts decisions essentially boil down to “*a fear that [if you take on certain pro bono clients or pro bono causes] your paying clients won't like you, that you will create animosity and lose business.*”¹⁴⁷ Cummings notes that “big firms are more likely to support pro bono in areas where the potential for positional conflicts is slim and where the firm can expect positive public relations”.¹⁴⁸ As noted above, such safe, popular subject matters apparently include family law, children’s rights and immigration and asylum. This suggestion appears to have been further confirmed by subsequent research carried out by Boutcher, discussed above, demonstrating that the range of causes and the range of clients represented by large law firms on a pro bono basis are relatively narrow (e.g. civil rights, women’s rights children’s rights, etc.).¹⁴⁹

While we do know a fair amount, at a general level, about conflicts of interest and how they interact with law firm decisions regarding the types of pro bono clients and causes to take on, we know relatively little about how these decisions are made in practice, on a micro level. To what extent are full-time pro bono lawyers free to make such decisions of their own accord and how involved are fee-earning lawyers and the firm’s partners in such decisions. To what extent would the outcome of any given decision vary depending on the particular lawyers and law firms involved (e.g. would the outcome change dramatically if you addressed the request for approval to two different partners in the same practice group in the same firm, or the same practice group, with more or less the same clientele, although at different firms?). In other words, how contingent are such decisions, how predictable are they? It seems likely that conflicts outcomes, beyond traditional conflicts, are significantly context-specific. Meaning that outcomes depend on a range of local factors such as: the clientele of the relevant firm; the leadership and culture of the firm; how high up the hierarchy decisions about pro bono matters are made; the legal practice area implicated; the degree of discretion full-time pro bono lawyers

¹⁴⁵ Cummings and Rhode, “Managing pro bono,” 2393.

¹⁴⁶ Spaulding, “Prophet and Bureaucrat,” 1412.

¹⁴⁷ Ibid., 1415.

¹⁴⁸ Cummings, “Politics of pro bono,” 123.

¹⁴⁹ Boutcher, “Lawyering for social change,” 188.

have to make such decisions; the nature of the pro bono matter and the identity of the pro bono client, etc. It would, therefore, perhaps be interesting to find out how such decisions are made and how outcomes might differ beyond the US, in other legal cultures. How, if at all, might conflicts outcomes differ between New York and Paris, Brussels and Prague, London and Sheffield? It might also be interesting to explore whether conflicts outcomes might differ in relation to the sectors of the implicated corporate clients. Would there be fewer concerns around positional and ideological conflicts where the corporate clients concerned are in the tech or retail sectors as compared to extractives and real estate (on the basis that the former types of clients are likely more progressive than the latter)? It is also important to note that positional (and ideological) conflicts arise not only in the context of litigation but in relation to all forms of pro bono work, from lobbying and law reform, to transactional work related to, for example, the governance, intellectual property and human resources of non-profits.¹⁵⁰ Consequently, given the importance of conflicts as a funnel through which all pro bono matters must be filtered, more research into this area is definitely warranted.

With respect to the array of other business interests that may have a bearing on pro bono decision-making within large law firms (e.g. recruitment, training and marketing), as this has been dealt with above (in the section on law firm rationales), it will not be explored again here. However, one interesting point made in the literature is worth briefly noting. Cummings points out that pro bono, as an institutionalized model of public service delivery, is not unique in this respect. That is to say that, the fact that economic concerns, unrelated to the public interest, may impact pro bono decision-making, should not be surprising if we consider that, for example, the interests of donor-organizations have long been recognized to have a disproportionate impact on the mandates and activities of NGOs and, similarly, legal aid priorities may be dependent on the political leanings of prevailing governments, “[i]n each context, the economic logic is clear: Patronage shapes case selection”.¹⁵¹ From this point of view, Cummings encourages us to view pro bono pragmatically as an incomplete substitute for the government-funded legal services program that it eclipses. It should not be viewed as a complete solution, but as a partial solution, forming one key component in a patchwork of legal service options open to low-income individuals and not-for-profit organizations. This insight opens interesting avenues for potential further research, particularly beyond the US. As pro

¹⁵⁰ Spaulding, “Prophet and Bureaucrat,” 1407.

¹⁵¹ Cummings, “Politics of pro bono,” 130.

bono takes shape in various legal cultures, how is this division of labor (with respect to public interest legal service provision) distributed, how do varying political, economic and legal cultures impact this division of labor? I hope that this thesis can indirectly provide some insight into this by exploring pro bono in Europe.

The literature raises several concerns broadly related to the quality and impact of pro bono legal work. A survey carried out by Rhode among leading public interest organizations revealed that “almost half reported extensive or moderate problems with quality in the pro bono work they obtained from outside firms... [t]he more specialized the work, the more difficulties arose in finding or equipping volunteer lawyers with the relevant skill sets”.¹⁵² The lack of expertise of pro bono lawyers in relation to certain kinds of work is only amplified where the work is predominantly carried out by junior lawyers, where there is limited or no supervision of such lawyers and where minimal or no effort is made to gain feedback from clients or to monitor and evaluate results and impacts. These are major concerns for an aspirational public legal service, as they would be for any service (public or private). However, such concerns are especially disconcerting in the pro bono context because, as one interviewed lawyer pointed out: “while paying clients may be able to vote with their feet, it is ‘harder for a pro bono client to find a replacement than it is for a paying client.’”¹⁵³ Cummings and Rhode note that one of the problems is that while law firms are incentivized to increase the quantity and visibility of their pro bono work (e.g. through rankings systems and for recruitment and business development purposes), there are not similar incentives to increase the quality and impact of such work.¹⁵⁴ On the other hand, they also note that there are several institutional features of large law firms and large law firm pro bono that mitigate against a complete absence of concern (at least for quality, if not impact). These include “[i]nternalized professional norms, the oversight of referring organizations, [...] the risks of ethical sanctions or malpractice liability [...], annual performance evaluations, partner and pro bono counsel supervision, and case-tracking systems”.¹⁵⁵ It is likely that such issues around the quality and impact of pro bono work will present equally, if not more so, in less developed pro bono cultures, with less institutionalized support and structure. This thesis will investigate this. What would also be interesting to further explore, is how such concerns around quality and impact might differ

¹⁵² Rhode, “Lawyers’ Public Service,” 1443.

¹⁵³ Cummings and Rhode, “Managing pro bono,” 2406.

¹⁵⁴ *Ibid.*, 2378–79.

¹⁵⁵ *Ibid.*, 2394–99, 2420.

depending on the area of law (it being of course likely that in an area like asylum law which is both fairly complex and beyond the expertise of corporate lawyers, the problems may be exacerbated), or the type of client. (One would expect large well-established non-profits like the NAACP or the ACLU to have much more power to “vote with their feet” than smaller non-profits, community groups or individual clients.)

2.1.6 The Globalization of Pro Bono

The final theme which I wish to discuss, emerging from the literature on pro bono as praxis or institution, is the globalization of pro bono. As mentioned above, from the early 2000s, as US and British law firms have globalized, their pro bono practices have also begun to globalize. However, limited research has been done to date to explore how exactly this process unfolds. There is a smattering of literature¹⁵⁶ variously exploring the globalization of pro bono and pro bono beyond the United States. To date, such literature has explored pro bono in countries including the United Kingdom,¹⁵⁷ Australia,¹⁵⁸ Brazil,¹⁵⁹ Singapore,¹⁶⁰ India,¹⁶¹ Sweden and China.¹⁶² Key findings and themes within this relatively small body of literature relate to: the causes or origins of pro bono in these new contexts;¹⁶³ the process of diffusion (from the US outwards);¹⁶⁴ the process of localization (how pro bono is being adapted to the local context);¹⁶⁵ and more typical institutionalist themes such as organization, structure and roles.¹⁶⁶

Before looking at these findings in more detail, it should be emphasized that significant research has been undertaken, over the course of the past two or three decades, into the globalization and internationalization of law. This voluminous body of research essentially explores two aspects; firstly, the way in which international, transnational and global processes

¹⁵⁶ N.B. At the time of writing, an edited volume is being written precisely on this theme (to which the present author is a contributor).

¹⁵⁷ See, for example, Boon and Whyte, “Charity and Beating,” 169–91.

¹⁵⁸ See, for example, Bartlett and Taylor, “Pro bono lawyering,” 273; and Twomey and Corker, “Pro bono at work,” 255–60.

¹⁵⁹ De Sa e Silva, “Doing well and doing good.”

¹⁶⁰ Whalen-Bridge, “Pro Bono in Singapore,” 97–143; Maguire, Shearer, and Field, “Reconsidering pro bono,” 1164.

¹⁶¹ Gupta, “Pro Bono,” 275.

¹⁶² Regan, “How and why is pro bono flourishing,” 148.

¹⁶³ See, for example, Boon and Whyte, “Charity and Beating,” 169–91; and Regan, “How and why is pro bono flourishing,” 148.

¹⁶⁴ See, for example, de Sa e Silva, “Doing well and doing good.”

¹⁶⁵ Ibid.

¹⁶⁶ Bartlett and Taylor, “Pro bono lawyering,” 273; Twomey and Corker, “Pro bono at work,” 255–60.

transform national law and practice, and secondly, the emergence of international laws, jurisdictions and institutions. One of the most significant early contributions to this literature came from Trubek, Dezalay, Buchanan, and Davis, in 1994.¹⁶⁷ The authors sought to demonstrate how emerging political and economic forces (e.g. changing production patterns, the linking of financial markets, the proliferation of multinational business, increasing privatization and regional trade patterns) were reshaping the nature and practice of law in both the professional and academic arenas. The authors noted both *vertical* and *horizontal* aspects of globalization and internationalization, the former stemming from the emergence of supranational and international jurisdictions penetrating the national sphere and the latter from the growing rate of interaction between formally national legal systems, actors, arenas and practice/knowledge sites.¹⁶⁸ The authors also explored the role that large US corporate law firms played in transforming legal practice beyond the United States (notably in Europe) and demonstrate the complexity of such processes in which there is a subtle interplay between external (i.e. US) and internal (i.e. European) legal traditions and norms resulting in hybrid forms of legal practice.

In subsequent years, two broad bodies of socio-legal literature have emerged exploring the globalization of law which, at the risk of oversimplification, might be categorized as approaches with a top-down lens versus approaches with a bottom-up lens. In the former category is the research on law and economic development.¹⁶⁹ In broad terms this research explores the how powerful, typically Western or Western-dominated, actors including major financial powers (such as the United States and the United Kingdom), international financial institutions, private banks, commercial law firms and political, business and legal elites use law and capital to build new markets in developing and transitional countries in the Global South or at the peripheries of the West. Certain countries are viewed as dominant, being the suppliers of law and capital, while others are recipients.¹⁷⁰ Of particular relevance, within this body of literature, are how certain legal models (e.g. laws, legal concepts and legal institutions), are “transplanted” from Western templates into new legal systems within the Global South, and the factors that influence the success or failure of such transplants.¹⁷¹ Also of relevance is

¹⁶⁷ Trubek, Dezalay, Buchanan, and Davis, “Global restructuring and the law”.

¹⁶⁸ Ibid.

¹⁶⁹ See e.g. Carruthers and Halliday, “Negotiating globalization”; Berkowitz, Pistor, and Richard, “Economic development, legality, and the transplant effect”; Dezalay and Garth, *The internationalization of palace wars*.

¹⁷⁰ Halliday and Osinsky, “Globalization of law”, 458.

¹⁷¹ See e.g. Berkowitz, Pistor, and Richard, “Economic development, legality, and the transplant effect”.

the role played by international and national elites (by reference e.g. to wealth, education, familial ties), in importing and exporting legal norms and building new legal practice sites and institutions.¹⁷² Such elites use the process of importing and exporting legal norms to elevate and maintain their elite status in national and international hierarchies.¹⁷³

Within the second basket of socio-legal literature exploring the globalization of law are those embracing a bottom-up, post-colonial lens.¹⁷⁴ From this vantage point, formerly colonial powers, which used law to control colonies, have replaced the colonial system of law with hegemonic global systems masquerading under universalist concepts such as the rule of law.¹⁷⁵ Supranational governments, hegemonic states (i.e. the United States), international governance systems, financial institutions, UN agencies and organs and private foundations are merely the “successors to the colonial state”.¹⁷⁶ From this perspective however, greater agency and attention is accorded to local actors who resist and contest global dynamics and transplants and force compromises and modifications.¹⁷⁷

From both vantage points however, what appears as globalization, is often actually what Santos has called “globalized localism”, meaning “the process by which local phenomena are successfully globalized”.¹⁷⁸ This often turns out to be “Americanization” rather than globalization insofar as American models of law and legal practice are exported, along with a certain model of capitalism, to other parts of the world by businesses, law firms, foundations, development agencies etc.¹⁷⁹ However, this is often a “thin globalization” insofar as there is a difference between *form* (the law on the books and the shape of legal institutions) and substance (law in practice or the lived experience of legal institutions) and imported norms and practices remain hybrid or contested below the veneer of global uniformity.

There has also emerged, from this body of literature, a specific focus on the globalization of Big Law and the role played by large law firms in the processes of globalization and

¹⁷² See e.g. Dezalay and Garth, *The internationalization of palace wars*.

¹⁷³ Dezalay and Madsen, “The force of law and lawyers”, 439.

¹⁷⁴ Santos and Rodríguez-Garavito, *Law and globalization from below*; Jenson and Santos, *Globalizing institutions*; Merry, *Human rights and gender violence*; Engle, “Transnational human rights and local activism”.

¹⁷⁵ Halliday and Osinsky, “Globalization of law”, 455.

¹⁷⁶ Ibid.

¹⁷⁷ Ibid.

¹⁷⁸ Snyder, “Economic globalization and the law,” 626; Wilkins, Khanna and Trubek, eds. *The Indian Legal Profession in the Age of Globalization*, 8.

¹⁷⁹ Ibid.

internationalization.¹⁸⁰ This body of literature aims at charting and modelling the growth and internationalization of large law firms and exploring the impact they have on national legal systems, actors, norms and practices.

All the above described literature on the globalization and internationalization of law is relevant in different ways to the current thesis and will be drawn on, from time to time, throughout the remainder of the thesis. In the following paragraphs, however, we will return to the much smaller body of literature on the globalization of pro bono, which in various parts, also draws upon and builds upon the above described larger body of literature.

Within literature on the globalization of pro bono, focus has been placed on explorations of the causes and origins of pro bono in various national settings. A large focus, as in the US, has been on declining legal aid spending. Cummings noted already in 2004 that “as in the United States, countries have focused increased attention on pro bono as state-sponsored legal aid schemes have been cut back under the banner of fiscal austerity.”¹⁸¹ The literature suggests that, at least in Australia, Sweden and Singapore, this may well be the case, although the evidence for a causal link is quite sparse. For example, discussing Australia, Maguire and colleagues argue that, with decreased public sector funding for legal aid, increasing attention has been placed on law firm pro bono as a supplement.¹⁸² Meanwhile, Whalen-Bridge, discussing Singapore, the UK and the US, writes that “[u]sing a wide angle comparative perspective suggests a relationship between legal aid and pro bono: the gaps in legal services brought about in part by the amount and type of government funded legal aid creates pressure on lawyers to provide pro bono legal services in response to the perceived need.”¹⁸³ Whalen-Bridge suggests that, unlike in the US and the UK where the focus has been on civil legal aid, limited spending on criminal legal aid in Singapore has nonetheless similarly contributed to the demand for and development of pro bono legal services.¹⁸⁴ In the Swedish context, Regan reports similar developments:

¹⁸⁰ See e.g. Galanter, “Mega-law and mega-lawyering”, Flood, “Megalawyering in the global order”; Faulconbridge et al., “Global Law Firms”; Beverstock et al., “Long arm of the law”; Bauman, *Pioneering a Global Vision*; Wilkins, Khanna and Trubek, eds. *The Indian Legal Profession in the Age of Globalization*; and Cunha, Gabbay, Ghirardi, Trubek, and Wilkins, eds. *The Brazilian Legal Profession in the Age of Globalization*.

¹⁸¹ Cummings, “Politics of pro bono,” 96.

¹⁸² Maguire, Shearer, and Field, “Reconsidering pro bono,” 1197.

¹⁸³ Whalen-Bridge, “Pro Bono in Singapore,” 141.

¹⁸⁴ Ibid. 428–430.

“Pressure to reduce public expenditure on legal aid in the early 1990s meant that substantial reforms were introduced to the scheme at the end of 1997 [...] One consequence of the 1997 reforms was that the Swedish Bar Association was prompted into action. Not only did it lobby the government against the severity of the cuts, the profession also underwent a remarkable change of heart toward pro bono legal assistance. Instead of continuing to regard pro bono as unnecessary, it established a ‘free first interview’ scheme across the country in the middle of 1998.”¹⁸⁵

In addition to pressures on legal aid spending, another driver of pro bono institutionalization internationally has been the broader globalization of US legal norms and practices, both via the internationalization of large law firms but also via legal education. In a well-written article, De Sa e Silva meticulously details how lawyers with US legal training and socialization were the first to push the corporate bar to consider institutionalizing pro bono in Brazil.¹⁸⁶ However, he also notes how another key driver of this diffusion was multinational corporations (i.e. law firm clients), used to collaborating on pro bono projects with law firms in the US and looking for the same types of collaboration in Brazil.¹⁸⁷ Yet another driver of the globalization of pro bono that both De Sa e Silva and Cummings point to is US-based non-profits (clearinghouses) such as PILnet, the Pro Bono Institute, the International Bar Association and the Vance Centre. These organizations have worked to connect US lawyers overseas with non-profit organizations seeking pro bono assistance, thus constructing pro bono infrastructure overseas.¹⁸⁸ Based on his finding that there have been multiple drivers of pro bono globalization in the Brazilian context, De Sa e Silva encourages researchers to think in terms of “globalizations” rather than globalization. However, De Sa e Silva also sheds important light on the process of localization. For instance, he explores how, based on resistance from the social bar and legal aid advocates, the organized bar intervened to restrict pro bono work exclusively to the provision of legal services to NGOs (a regulation which was subsequently overturned), and restricted any form of law firm advertising related to pro bono (this based on fears from commercial law firms that some firms might use pro bono to secure competitive advantages with corporate clients).¹⁸⁹ Overall, De Sa e Silva’s study sheds significant light on

¹⁸⁵ Regan, “How and why is pro bono flourishing,” 150, 151.

¹⁸⁶ De Sa e Silva, “Doing well and doing good,” 8.

¹⁸⁷ Ibid.

¹⁸⁸ Cummings, “Politics of pro bono,” 97, 98; de Sa e Silva, “Doing well and doing good,” 4.

¹⁸⁹ De Sa e Silva, “Doing well and doing good,” 9, 19–22.

the global and local dynamics of norm transfer in the context of pro bono. The present thesis hopes to do the same in the European context.

A final theme within the literature relates to the architecture of globalized pro bono which, at least in some contexts, is remarkably similar to the US pro bono architecture. For instance, in Australia, Bartlett and Taylor note that “[p]ro bono coordinators or partners in large law firms in Australia are now ubiquitous”¹⁹⁰, while Twomey, based on survey data, reveals that “[n]inety per cent of multi-office firms indicated having a national system of co-ordination for pro bono legal work and 80 per cent of firms with only one office have some system for co-ordination of pro bono legal work.”¹⁹¹

Overall, the existing literature on international pro bono or the globalization of pro bono is quite limited in several respects. Insufficient attention has been paid to the processes of globalization and adaption or localization. There is a lack of exploration of how pro bono differs as it expands to new contexts and the reasons for such variation (although the studies by De Sa e Silva and Whalen-Bridge are exceptions). There has been only cursory exploration of the role of non-profits in diffusing pro bono culture beyond US borders and their influence in determining how pro bono is defined and deployed in new contexts. Moreover, law firms are globalizing at a phenomenal rate and so one would expect to find pro bono in virtually every corner of the world, yet the map of pro bono literature remains remarkably sparse. It is hoped that the present thesis can do much to address these gaps in the literature.

2.2 Pro bono as “culture”, “ideology” or “symbol”

As discussed above, with the emergence of the “cause lawyering” literature in the mid 1990s, scholarly attention on social change lawyering shifted from questions about defining a practice and set of institutions, to questions about the motivations, ideology and politics and cultural contexts of lawyers pursuing social change. This shift in focus can also be seen in the literature on pro bono where scholars began to explore, on the one hand, lawyer motivations for doing pro bono work, pro bono as an expression of lawyers’ identities and pro bono as culture, and, on the other hand, pro bono as politics and pro bono as a professional ideology and as a

¹⁹⁰ Bartlett and Taylor, “Pro bono lawyering,” 273.

¹⁹¹ Twomey and Corker, “Pro bono at work,” 257.

normalizing, legitimizing or justificatory narrative of power. Given that these themes are less important in the context of the present thesis, far less space will be dedicated, here, to exploring these themes than to the themes discussed just above. However, this does not imply that these themes are less well explored in the literature.

2.2.1 Lawyer motivations for doing pro bono work, pro bono as an expression of lawyers' identities and pro bono as culture

The literature reveals many motivations for lawyers engaging in pro bono work including: mobilizing events (e.g. 9/11 or the Trump Muslim Ban); charismatic leadership or support and encouragement from leadership of the firm; professional benefits such as training opportunities, trial experience or network development; a sense of obligation (professional, moral or both); personal/intrinsic satisfaction; an opportunity for direct involvement with clients; and religious or political commitment.¹⁹² It seems likely that among these motivations, a sense of intrinsic or personal satisfaction and a sense of moral or professional obligation are the strongest motivating factors, followed by employer policies and encouragement and personal benefits.¹⁹³ One might expect such findings (regarding lawyer motivations) to vary somewhat from culture to culture, yet findings from an Australian survey also suggest that a sense of personal satisfaction and a sense of personal obligation are also major motivating factors for Australian lawyers.¹⁹⁴ Albeit that these both represent common law, Anglo-Saxon legal cultures, this possibly suggests that personal motivations for doing pro bono (certainly within large law firms) may not vary that dramatically across legal cultures. It might therefore be interesting to explore whether mobilizing events, for example, might play a similar role in motivating lawyers to do pro bono in other parts of the world as they have in the US. Indeed, some recent findings in the context of clinical legal education suggest that events such as the migrant crisis and the financial crisis in Europe have motivated law teachers to pursue models of social justice lawyering there.¹⁹⁵ It is likely, nevertheless, that cultural variation in the motivations of lawyers doing pro bono will emerge as pro bono continues to flourish beyond the United States and, hopefully, future research can shed more light on this.

¹⁹² Epstein, "Stricture and structure," 1692–97; Rhode, "Pro bono in principle," 447; Granfield, "Meaning of pro bono," 138; Rhode, "Lawyers' Public Service," 1440; Boucher, "Lawyering for social change," 182; Bartlett and Taylor, "Pro bono lawyering," 270–79.

¹⁹³ Rhode, "Pro bono in principle," 447; Schmedemann, "Pro Bono Publico," 977.

¹⁹⁴ Bartlett and Taylor, "Pro bono lawyering," 270–79.

¹⁹⁵ See Alemanno and Khadar, *Reinventing Legal Education*, introduction and conclusion, 1–26, 322–48.

As noted above, the literature also suggests that younger lawyers, lawyers with higher law school test scores, female and minority lawyers are the most likely to engage in pro bono.¹⁹⁶ It has further been revealed that lawyers are much more likely to do pro bono work when they are socialized with and exposed to other lawyers who do pro bono work.¹⁹⁷ Indeed, it has been suggested, on the basis of such findings, that there may be a “cultural orientation” to doing pro bono and that doing pro bono may be a manner of expressing one’s identity as a lawyer. Granfield and Veliz, for example, suggest that “the cultural orientation to do pro bono is, in part, class and status-based; that is, graduates of elite law schools working in large law firms are more likely to have personal and professional values that facilitate the decision to do pro bono work”.¹⁹⁸ Meanwhile, Rhode has suggested that for minority lawyers “[w]ork for racial, ethnic, or other disadvantaged groups can also be an important form of “giving back” and affirming identity”.¹⁹⁹ Dinovitzer and Garth found that it was African American lawyers at large commercial firms, rather than those at smaller and mid-sized firms, that were doing the most pro bono, which perhaps lends further credence to the idea that pro bono may be a form of affirming identity and “giving back” for lawyers perhaps uncomfortable with the prestige and wealth that comes with Big Law. Again, it would be interesting to explore whether such findings, in relation to young lawyers with high test scores and minority and female lawyers, also translate beyond the US. It seems unlikely that the findings in relation to women and young lawyers would differ dramatically around the world, and indeed, findings from Australia mimic the US findings.²⁰⁰ However, it would be interesting to explore whether findings in relation to minorities, which seem quite specific to the US context, might also be replicated in other parts of the world and whether other demarcations such as class, caste, tribe, political affiliation, etc. would equally predict pro bono engagement in other parts of the world.

Another interesting observation from the literature relates to how pro bono may be deployed as a strategy in the career of elite lawyers. Dinovitzer and Garth found that elite lawyers (i.e. from top ten law schools) were socialized into valuing pro bono already during law school and that such lawyers were both more likely to value pro bono opportunities at large law firms, and more likely to be able to personally and professionally benefit from such work (for example

¹⁹⁶ Handler, Hollingsworth, and Erlanger, *Pursuit of Legal Rights*, 124; Bartlett and Taylor, “Pro bono lawyering,” 260–80; Webley, “Pro bono and young solicitors,” 152–68; Granfield, “Meaning of pro bono,” 130; Dinovitzer and Garth, “Pro bono as elite strategy,” 120–24; Boucher, “Private Law Firms,” 555.

¹⁹⁷ Granfield and Veliz, “Social Basis of Volunteer Legal Work,” 37–38.

¹⁹⁸ *Ibid.*, 26.

¹⁹⁹ Rhode, “Lawyers’ Public Service,” 1440.

²⁰⁰ Bartlett and Taylor, “Pro bono lawyering,” 275.

through professional recognition in the form of awards and honors).²⁰¹ They also found that doing *some* pro bono work versus *none*, increased job satisfaction for such lawyers, whereas *increasing* pro bono hours had no effect on, or even decreased, job satisfaction.²⁰² Based on these findings, they hypothesized that pro bono provides elite lawyers at large firms with a form of *symbolic capital* along with more tangible forms of capital such as training, court opportunities and connections. Meanwhile, Cummings has reflected on how such symbolic capital might be traded in, later in the career of such lawyers:

“Some lawyers [...] engage in pro bono as a means of enhancing job opportunities, building a public service persona that allows them to move back and forth between private sector, governmental, academic, and nonprofit posts [...] Lawyers also use pro bono as a way to maintain contacts with public interest groups while they cycle through the private sector for a short stint in order to pay off debt, build skills, or develop professional relationships [...] Pro bono can also provide firm lawyers with an exit strategy to the extent that contacts made with public interest organizations through pro bono can develop into full-time jobs.”²⁰³

Perhaps we understand less about the extent to which pro bono may contribute to symbolic capital, or detract from such capital, within the large law firms themselves. Handler noted already in 1970 that lawyers who did pro bono were not necessarily negatively affected by having done pro bono in terms of their career path at such firms (simply by noting that many such lawyers were still at the relevant firms several years after having been heavily involved in pro bono work).²⁰⁴ Similarly, Cummings has suggested that some lawyers use pro bono to craft lifelong careers within private law firms that include significant public interest work.²⁰⁵ This is further supported by the subsequent work of Cummings and Rhode that found that many of the full-time pro bono lawyers at large firms actually started as fee-earners within those firms and were able to successfully convert their pro bono experience into full-time roles.²⁰⁶ We also know that doing pro bono may sometimes mark out lawyers as not a “good fit” within law firms (particularly during economic downturns) as discussed above. Nevertheless, we still

²⁰¹ Dinovitzer and Garth, “Pro bono as elite strategy,” 131.

²⁰² *Ibid.*, 130.

²⁰³ Cummings, “Politics of pro bono,” 102, 103.

²⁰⁴ Handler, Hollingsworth, and Erlanger, *Pursuit of Legal Rights*, 124.

²⁰⁵ Cummings, “Politics of pro bono,” 102.

²⁰⁶ Cummings and Rhode, “Managing pro bono,” 2423, 2424.

know relatively little about how pro bono may positively or negatively impact the status of commercial lawyers within their firms and, perhaps more importantly, the reasons why, in either case. Again, one would expect that whether pro bono has symbolic value or, on the contrary, may become a form of stigma, may depend on the micro and macro legal culture (i.e. the culture of the legal practice group, the culture of the business sector, the culture of the firm, the legal professional culture of the city and the culture of the country).²⁰⁷ Hopefully, future research will shed more light on such possible patterns of variation.

More recently, and along these lines, some commentators have begun to critique the idea of studying pro bono from the point of view of lawyer motivations. Boutcher suggests that “pro bono participation is more than simply the aggregation of individual predispositions found within the firm”.²⁰⁸ Rather, the pro bono engagement of lawyers must be understood in the context of the institutional environment of such lawyers, the culture of that environment and the opportunities and constraints it places on pro bono.²⁰⁹ For instance, Boutcher notes that factors such as pro bono rankings systems, the pressure to attract commercial clients and the desire to recruit the best graduates may all influence the culture of law firms and the broader institutional environment, which in turn will create more favorable micro-ecosystems for lawyers at large firms wanting to engage in pro bono work.²¹⁰

Ultimately, the literature now provides a complex understanding of lawyer motivations and meanings for engaging in pro bono work and also how such motivations and meanings interact with the institutional context in which the lawyer practices law. Perhaps another dynamic that we understand less about is what role such motivations and meanings (apart from or in combination with the institutional context) play in determining which kind of pro bono work lawyers choose to engage in, which types of causes and clients they choose to represent.

²⁰⁷ N.B. Grandfield and Mather have suggested that “the type of pro bono work undertaken within a law firm also reflects the social, economic, and even political context of the firm”. Granfield and Mather, *Private Lawyers and Public Interest*,” 11.

²⁰⁸ Boutcher, “Private Law Firms,” 544.

²⁰⁹ Boutcher, “Lawyering for social change,” 183.

²¹⁰ Boutcher, “Rethinking Culture,” 127.

2.2.2 Pro bono as politics, as a professional ideology and as a normalizing, legitimizing or justificatory narrative of power

A key theme in the literature is how pro bono interacts with, or is influenced by politics beyond the firm. In the context of legal aid reform, or political discussions around legal aid reform, this idea is not novel and will be discussed in more detail in section 3 below. However, more recently, Boutcher has interestingly explored how social movements are beginning to penetrate law firms via public interest organizations (or “cause organizations”) working with pro bono lawyers. Boutcher begins by challenging one of the basic tenets of the “cause lawyering” literature discussed above, that cause lawyers must be distinguished from conventional lawyers on the basis of their use of advocacy as a means to an end rather than as an end in itself.²¹¹ To the contrary, Boutcher finds that “social movement goals have become widely legitimated within the structure of corporate law firms”.²¹² In line with the above discussion on conflicts, Boutcher concedes that “there could still be support for the argument that pro bono is not “transgressive” enough to incorporate more recent, and possibly more controversial, issues like animal rights, environmental justice, or gay rights”.²¹³ Nevertheless, he argues convincingly that as social movements have become more pervasive within American society, their strategies have become more professionalized and more institutionalized, and it should therefore be unsurprising that they might wish to take advantage of pro bono services offered by large commercial law firms to gain access to, and to be more effective within, political and legal institutions.²¹⁴ Consequently, pro bono programs in large law firms have become a site of cause lawyering activity. This is perhaps a logical conclusion if it is true, as discussed above, and as Boutcher has noted elsewhere, that firms are increasingly developing deeper relationships with a narrower range of clients and engaging in fewer causes, and as Abel suggests, that established public interest organizations now exist in a “symbiotic relationship” with the pro bono practices of large commercial law firms creating a “mutual dependence”.²¹⁵ Whatever the case, the nature of law firm relationships with NGO clients and their politics is a fascinating area for further study and something which this thesis, indirectly, hopes to further explore in the context of Europe.

²¹¹ Boutcher, “Lawyering for social change,” 182, 183.

²¹² *Ibid.*, 191.

²¹³ *Ibid.*, 192.

²¹⁴ *Ibid.*, 182.

²¹⁵ Abel, “Paradoxes of Pro Bono,” 2447.

Another important theme in the literature, noted already in the 1995 study by Katzmann and colleagues, is that pro bono may be used instrumentally by the profession to overcome skepticism within society about lawyers and low regard for the legal profession.²¹⁶ In the subsequent years this position has been restated by multiple authors with more or less cynicism. Some have noted that much like the doctors, lawyers have a monopoly on what represents a core public service (i.e. legal services) and that such monopoly has been justified by the profession by reference to the “prophetic role of the lawyer” or, more specifically, the aspiration and duty of pro bono service.²¹⁷ Others have noted, more cynically, how pro bono has been wheeled out by the profession, particularly at times where the profession faces a crisis of legitimacy, for example, as noted above, where regulators are threatening to deregulate the provision of legal services and open up the provision of legal services to non-lawyers, or where politicians have begun to criticize the profession for being too business-oriented and insufficiently public-spirited.²¹⁸ Yet others have suggested that pro bono may be used by the profession as a “loss leader” to build new legal markets by sensitizing clients to the value of legal services, or by elite segments of the profession seeking to (re)establish their public interest credentials or usurp such credentials from other, less influential, parts of the profession.²¹⁹

2.3 Conclusion: Praxis to what end?

The literature review presented above has hopefully established at least three of the points that this chapter set out to establish, i.e. firstly that Big Law Pro Bono (rather than merely “pro bono” – meaning lawyers acting outside of the Big Law setting providing free legal services), emerged as practice and as object of study in the US, secondly that the academic study of Big Law Pro Bono flows from US literature on social justice lawyering and straddles both the public interest law and cause lawyering strands of that body of literature, and thirdly that there are gaps in relation to the key themes explored within the pro bono literature. Notable among such gaps, for the purposes of the present thesis, are gaps related to the globalization of Big

²¹⁶ Katzmann, *Law Firm and Public Good*.

²¹⁷ Spaulding, “Prophet and Bureaucrat,” 1398; Cummings, “Politics of pro bono,” 115; Dinovitzer and Garth, “Pro bono as elite strategy,” 115.

²¹⁸ Granfield, “Meaning of pro bono,” 115, 139; Rhode, “Lawyers’ Public Service,” 1441; Sandefur, “Lawyers’ Pro Bono Service,” 79–112.

²¹⁹ Boon and Whyte, “Charity and Beating,” 170; Dinovitzer and Garth, “Pro bono as elite strategy,” 115.

Law Pro Bono and the institutionalization of Big Law Pro Bono and, specifically, the role played by intermediary organizations.

Ultimately, the above review provides crucial framing for the material that will be covered in the following chapters. In exploring whether Big Law Pro Bono contributes to access to justice in Europe, it is essential to understand the way in which Big Law Pro Bono has been studied to date. What should hopefully be apparent is that certain attributes of Big Law Pro Bono emerge from the structure of large law firms and the commercial environment in which they operate, both of which are likely to be fairly consistent globally, across jurisdictions. However, other features relating, for example, to the clientele, the nature of the work carried out, the roles of intermediaries and the regulatory or cultural obstacles to engaging in pro bono work are likely to be highly context-specific. As such, when studying Big Law Pro Bono beyond the US, such attributes cannot be taken for granted.

In the following section, I will explore the primary empirical and normative function of Big Law Pro Bono as it is understood in the United States, i.e. promoting access to justice in the form of civil legal aid. It is my contention, that this objective, understood widely as the *raison d'être* for Big Law Pro Bono is highly context-bound and, as such, should be treated with caution when studying Big Law Pro Bono in Europe.

3 Pro Bono as Legal Aid – Historical Contingency in the Development of Big Law Pro Bono

In this section, I want to achieve two objectives. The first is to explore and establish the idea that, unlike other forms of social justice lawyering, pro bono is better construed as a resource rather than a cause and is inherently ideologically and politically empty. The second objective, which follows from the first, is to explore another key theme in the literature, which relates to the idea of pro bono as a historically and politically contingent social institution, i.e. the idea that pro bono, as an institution, has emerged from a specific historical and political context. Achieving these objectives is necessary because, as mentioned, if I am to study Big Law Pro Bono in Europe, I must first, at least partially, unmoor it from its US origins. To do so requires an appreciation of the contingency of Big Law Pro Bono both as practice and object of study. In this thesis, I wish to argue that in Europe, a unique variant of Big Law Pro Bono has emerged,

distinct from the model that took shape in the United States. To do so, I need to demonstrate that Big Law Pro Bono is, at least partially, plastic or contingent and that the local context against which the institution takes shape can play a significant role in determining the shape that is ultimately taken.

Indeed, it is well established that sociological thought will be influenced by the political and social context in which it is formed.²²⁰ It is furthermore uncontroversial to suggest that social institutions emerge from specific historical, economic and political background contexts, which may influence the shape that such institutions take.²²¹

A central underlying premise in this thesis, to be discussed throughout, is that Big Law Pro Bono is a resource that is inherently ideologically empty. As such, it is given political or ideological direction by the relevant historical and socio-political context in which it is deployed. Below and further in Chapters 2 and 4, I will suggest that, as Big Law pro bono emerged in the United States, it was significantly institutionalized between two distinct historical moments: on the one hand, the War on Poverty and the emergence of the Office of Economic Opportunities Legal Services Program and, on the other hand, the subsequent decline in federal spending on civil legal aid. The consequence of this, I will suggest, is that Big Law pro bono came to be understood functionally as one solution to the “justice gap”, i.e. as a resource oriented toward the provision of civil legal aid for low-income individuals.

Again, it is important to emphasize here that, where I talk of pro bono, I am really talking of Big Law Pro Bono and also, necessarily, of Big Law Pro Bono in the US. However, a key objective is to separate out which parts in the practice and study of Big Law Pro Bono are context-bound and which are not. It is crucial to understand this before we begin with the exploration of Big Law Pro Bono in Europe and address the question of whether it contributes to access to justice.

²²⁰ See, for example, Bramson, *Political Context of Sociology*.

²²¹ Dezalay and Madsen suggest that “the actual configuration of any legal field is historically contingent and, thus, a social product that needs to be analyzed in light of its historical process of construction”. Dezalay and Madsen, “The force of law and lawyers”, 443. See also, for example, Abel, “Law without politics,” 474. Abel explores how modern legal aid systems emerged in the twentieth century, noting the role of various social, political, and economic developments throughout that period.

3.1 Pro bono is a resource rather than a cause and is inherently ideologically and politically empty

As noted above, the “cause lawyering” literature defines cause lawyering in contrast to so-called “conventional lawyering”:

“The objective of the attorneys that we characterize as cause lawyers is to deploy their legal skills to challenge prevailing distributions of political, social, economic, and/or legal values and resources. Cause lawyers choose clients and cases in order to pursue their own ideological and redistributive projects. And they do so, not as a matter of technical competence, but as a matter of personal engagement [...] They have no qualms about embracing the values and goals of those whom they represent. Indeed, they take pride in thus challenging traditional concepts of professionalism. At least in principle, then, cause lawyering stands in sharp and self-conscious contrast to traditional conceptions of lawyering, according to which attorneys are expected to provide case-by-case and transaction-by-transaction service to particular clients without reference to either their own or to their clients’ values, policy preferences and political and social commitments”.²²²

Conventional lawyering, therefore, is defined precisely by the absence of an ideological orientation, by the absence of a political, policy or social agenda. It is defined by the provision of legal services on a case-by-case, transaction-by-transaction basis, with the only ideological commitment being towards the ideology of advocacy, professionalism and technical competence.

Based on an empirical study conducted in Seattle, Scheingold and Blom echo this sentiment and suggest that conventional lawyering is distinguished from cause lawyering by the absence of “transgressiveness”, i.e. the extent to which a lawyer is willing to move beyond conventional models of legal representation and to depart, in particular, from the principle of neutrality, to embrace the political and social causes of her/his clients.²²³ While they suggest that pro bono may be a form of cause lawyering, they caveat that it is “distinguishable from conventional lawyering only because little or no fee is asked for services rendered. Otherwise this is

²²² Sarat and Scheingold, *Cause Lawyering and the State*, 13.

²²³ Scheingold and Bloom, “Transgressive cause lawyering,” 212.

conventional lawyering...”.²²⁴ They go on to reveal that in their interview sample, commercial pro bono lawyers “show no interest in pushing their cause lawyering beyond the professionally respectable and the politically non-controversial.”²²⁵

Meanwhile Sarat and Scheingold go so far as to explicitly define pro bono in contrast to cause lawyering. They suggest that, in contrast to cause lawyering, which is directed at “altering some aspect of the social, economic and political status quo”, conventional public service efforts, such as pro bono, are seen, by those carrying out such work as, “ancillary to the central activity of the legal profession, which is to provide fee-for-service lawyering.”²²⁶ Moreover, they suggest such efforts are “for the most part confined to responding to unmet legal need”, which, it is implied, is devoid of “political ideology, public policy or moral commitment”.²²⁷

Separately, Thomas Hilbink developed a typology of cause lawyers, ranging from: the “grassroots” lawyer who views law as just another type of politics, sees the legal system as unjust, corrupt and unfair and is led by the cause, movement or clients; to the “elite/vanguard” lawyer, who views law as the best form of politics, sees the legal system as a liberating force which typically delivers justice, pursues a legal outcome as the goal of advocacy and leads the cause, with the clients taking a back-seat; to the “proceduralist”, who sees law and politics as distinct and separate, sees the legal system as essentially fair and just, sees the provision of representation as the goal, views her/his role as a neutral representative to a client and not a cause.²²⁸ On this spectrum, scholars would tend to agree that pro bono falls squarely within the “proceduralist” category.²²⁹ That is to say that, in pro bono lawyering, *representation is the end*, and not merely a means to an end. Pro bono is simply a functionally undetermined resource; a large pool of “conventional” or “proceduralist” lawyers, available to provide technical legal services to clients for no fee. That is to say that, inherently, pro bono is ideologically and politically empty. It might be that one or other lawyer providing pro bono services, from within a large firm, closely identifies with a particular client or cause and gets so involved that she/he effectively transcends conventional lawyering to embrace transgressive lawyering. However, this would not render the pro bono resource of the relevant firm, as a

²²⁴ Ibid., 214.

²²⁵ Ibid., 221.

²²⁶ Sarat and Scheingold, *Cause Lawyering*, 4.

²²⁷ Ibid.

²²⁸ Hilbink, “Categories of cause lawyering,” 664.

²²⁹ Cummings, “Politics of pro bono,” 137.

whole, cause lawyering. In other words, pro bono is a resource, defined not by any ideology or politics, but by a commitment to provide technical expertise, at no cost, to clients who otherwise would not have access to such expertise.

This is significant because it means that Big Law Pro Bono, when being deployed in any particular context (i.e. in a new jurisdiction/region) will not necessarily be oriented towards any particular social cause or policy or political objective. Rather, Big Law Pro Bono simply represents a resource; a large pool of technically competent lawyers willing (or instructed) to work for free for any number of causes. Although here, we should of course caveat that the potential for positional and ideological conflicts of interests (discussed above) may naturally limit the likely range of causes to those issues that are socially and politically uncontroversial within the relevant commercial context (children's rights, women's rights and the like).

3.2 Pro bono as an historically and politically contingent social institution

More than just being politically and ideologically indeterminate, I want to suggest that Big Law Pro Bono is also historically and politically contingent. As discussed above, it is evident from the literature that pro bono in the US, as practiced by large commercial law firms, experienced two periods of institutionalization. The first was in the 1960s and 1970s and the second occurred between the 1980s and early 2000s. It is also evident from the literature, that pro bono, as a resource, took shape against the political debates, ideas and movements that were consuming the legal profession at those times.

As noted above, the first wave of institutionalization was largely triggered as the result of a perception among large law firms that public interest law career opportunities were sapping their talent pool of elite lawyers. Such public interest law career opportunities had emerged as a consequence of the poverty law and public interest law movements, also discussed above. A 1969 memo from Hogan & Hartson (now Hogan Lovells) read:

“It has become increasingly evident that there is a tendency among younger lawyers, particularly those with highest academic qualification, to seek out public service-oriented careers as an alternative to practice in the larger metropolitan law firm.”²³⁰

²³⁰ Ibid., 22–23.

It has been suggested that this feeling was shared by many firms, several of which responded by setting up “pro bono programs”.²³¹ Of course, at the time, the idea of a formal, institutionalized, pro bono program was novel. There was no precedent to refer to. Moreover, as noted above, pro bono is a resource and not a cause. Consequently, there is no political or policy agenda to which pro bono should be obviously directed. However, given that the objective was to create opportunities for public service within the structure of large firms, inspiration was taken from the very public interest law and poverty law movements that had created the problems with recruitment to start with. Literature from that period and subsequent literature makes clear how the poverty law movement, in particular, became a major source of inspiration for the newly established pro bono programs.²³² Lawyers explicitly spoke in terms of “institutionaliz[ing] poverty law practice” within the structure of their firms.²³³ It is evident that the initial response from private law firms, although clearly linked to the questions around recruitment, cannot be clinically separated from the on-going poverty law movement and the broader political debate in America at that time around eliminating poverty. A commentator in writing in the American Bar Association Journal in 1970, characteristically suggested that:

“[a]s the demand for equal justice for all becomes more vocal and more militant, private law firms are joining in the effort [...] and are experimenting with imaginative new methods for enlarging their role in providing legal services for all [...] Attorneys, and particularly young attorneys, who are dissatisfied with traditional law practice caution against token *pro bono publico* efforts by law firms. They call for total commitment to the elimination of poverty.”²³⁴

Indeed, legal services organizations were actively lobbying law firms to establish pro bono programs focused on providing legal services to low-income clients. For example, at the 1970 “Midyear Meeting of the American Bar Association”, the National Legal Aid and Defender Association conducted a roundtable discussion on the involvement of private firms in poverty law. The roundtable was attended by leading firms from across the country and the themes included: how to identify clients, how to collaborate with existing legal services organizations,

²³¹ Handler, Hollingsworth, and Erlanger, *Pursuit of Legal Rights*, 45.

²³² See, for example, “Structuring the Public Service Efforts,” 410; Berman and Cahn, “Bargaining for Justice,” 16; Ashman, *New Private Practice*; Smith and Kratz, “Legal Services for the Poor,” 509; and Rideout, “Pro Bono Publico Efforts,” 333.

²³³ Smith and Kratz, “Legal Services for the Poor,” 510, n. 5.

²³⁴ Ashman and Woodard, “Private Law Firms Serve the Poor,” 565.

an exploration of the “branch office model” and so on.²³⁵ Writing more recently, Boutcher notes that, “*the 1960s with the advent of President Johnson’s “War on Poverty,” [...] shifted pro bono from a form of noblesse oblige to a focus on “access to justice”— targeting direct legal services for the poor*”.²³⁶

Indeed, as will be discussed in more detail later in the thesis, if one observes the pro bono programs that law firms were establishing at the time, one notices a distinct and consistent focus on access to justice for low-income individuals. The programs that were set up variously involved: setting up branch offices in poor neighborhoods to service low-income clients; or seconding lawyers to legal service organizations and legal aid offices.²³⁷ Of course, it is true that there was also some focus on other models of public interest lawyering such as Nader-inspired lobbying and NAACP/ACLU-inspired law reform work, but by and large there was, during this first period of pro bono institutionalization, a strong linking of the pro bono resource with the ideology of the poverty law movement and the broader political effort to eradicate poverty.²³⁸

This linking of the pro bono resource with the political agenda to eradicate poverty - or its legal equivalent: to close the justice gap – would be further consolidated during the second period of pro bono institutionalization, between the 1980s and early 2000. Again, background political developments and debates would play a decisive role in giving political direction and ideological form to the pro bono resource.

Cummings, for example, suggests that:

“the story of pro bono's institutionalization is [...] *bound up in the broader political movement away from the state as the locus of large-scale social service programs—a trend symbolized in the reaction against the welfare state apparent in President Ronald Reagan's commitment to shrinking “big government” in the 1980s and President Bill Clinton's sweeping welfare reform in 1996*”.²³⁹

²³⁵ Ibid., 567.

²³⁶ Boutcher, “Lawyering for social change,” 181.

²³⁷ McGonagle, “New Lawyers and New Law Firms,” 1139–43.

²³⁸ See, for example, Cahn and Cahn, “Power to the People,” 1048.

²³⁹ Cummings, “Politics of pro bono,” 19.

Cummings details how, already in the mid-1970s, under the Nixon administration, steps were taken to curb the activities and reduce the funding of the federal legal services program. As federal legal services continued to decline both in terms of its funding and its scope of activities under the Reagan and Bush administrations, as the politics moved away from the welfare state ideal towards increased emphasis on private volunteerism, pro bono gradually began to be seen by the legal profession (and most notably the American Bar Association) “as a supplement to the beleaguered legal services program”.²⁴⁰ What is interesting, however, is how the ABA and the private bar sought to define pro bono and orient this resource in direct contrast to the ideal of the public interest lawyer (or the “cause lawyer”, in the way that the term is used in the literature).

Cummings details how, in large part, the aggressive stance of Republican lawmakers and administrations towards the legal services program was in fact a backlash triggered by the more activist and law reform oriented work carried out by some funding recipients under the program (in particular, aggressive legal strategies including impact litigation and lobbying targeted at government agencies and businesses).²⁴¹ Cummings further suggests that the “organized bar was never completely comfortable with the notion of law reform and the challenge it posed to professionalism.”²⁴² Consequently, as pro bono emerged as one possible response to the decimation of the legal services program, the ABA seized the chance to define pro bono narrowly, in a manner consistent with conventional professional service norms. For the ABA, this killed two birds with one stone. Firstly, it allowed the organized bar to put forward pro bono as a response to calls for greater private volunteerism, and so, to reassert the public service commitment of the legal profession. Secondly, it allowed the organized bar to redefine public service away from more “transgressive” models of public interest lawyering, and towards a more conservative model, with which it was much more comfortable.²⁴³ Pro bono was increasingly defined as “a commitment by private-sector attorneys to *themselves engage in direct representation* to discharge their service obligations.”²⁴⁴ Accordingly, throughout the 1980s and 1990s, the organized bar “invested heavily” into institutionalizing *a specific model of pro bono*, a model that construed pro bono functionally as a solution to the justice gap created by limited federal spending on civil legal aid. To this end, the ABA introduced a model rule in

²⁴⁰ Ibid., 32.

²⁴¹ Ibid., 21.

²⁴² Ibid., 15.

²⁴³ Ibid., 18.

²⁴⁴ Ibid.

1993 that established an aspirational target of 50 hours and narrowed the definition of pro bono to provide that each lawyer “should aspire to render at least (50) hours of pro bono publico legal services per year,” a “substantial majority” of which targeted to “persons of limited means” or organizations that advocate on their behalf.²⁴⁵ Moreover, the organized bar became involved in funding non-profit legal services organizations and corralling them into collaboration with private law firms and promoting volunteerism within those law firms, where volunteerism meant providing legal services directly to low-income individuals. This discourse, and this vision, set the course for the second major period of institutionalization of pro bono within large US law firms. As noted above, even to this day, the large bulk of pro bono work carried out by large law firms in the US involves the provision of legal services directly to low-income individuals.²⁴⁶ Writing in 2009, Abel reflected that, “[t]he original OEO Legal Services Program gave equal emphasis to serving individual clients, law reform (impact cases), and community organizing. By contrast, the highest priority of pro bono programs is individual legal service.”²⁴⁷

Scholars within the US pro bono literature reinforce point. The literature tends to normatively and empirically orient pro bono towards the justice gap. The first significant edited volume on pro bono in the mid-1990s “The Law Firm and the Public Good”, is a great example in this respect.²⁴⁸ While there was some disagreement amongst the authors about what kinds of activities constituted pro bono, there was remarkable agreement that focus should be placed primarily on the provision of legal services to those who could not otherwise afford them, a proposition that even reviewers of the volume shared.²⁴⁹ Subsequent authors have embraced the same normative position. Many scholars, in writing about pro bono, embrace the ABA definition, which as noted just above, directed pro bono functionally towards the provision of pro bono services to low-income clients or organizations that supported such individuals.²⁵⁰ Consequently, there is a shared understanding that providing civil legal aid is the *raison d'être* of pro bono. Justus, writing in 2003 argues:

²⁴⁵ Ibid., 32.

²⁴⁶ Faith-Slaker, “Supporting Justice,” 8; Buczek, Stuth, and Faith-Slaker, “Supporting Access to Justice III,” A-8.

²⁴⁷ Abel, “Paradoxes of Pro Bono,” 2448.

²⁴⁸ Katzmann, *Law Firm and Public Good*.

²⁴⁹ Garth, “Competition to Do Good,” 99.

²⁵⁰ See, for example, Burke, McLaurin, and Pearce, “Pro bono public,” 61; Jacobs, “Pro Bono Work,” 509; Spaulding, “Prophet and Bureaucrat,” 1395–434; Boyle, “Meeting the Demands,” 415; and Roberts, “From the War on Poverty to Pro Bono,” 341.

“The compelling need for pro bono legal services from the private bar cannot be understated. Studies routinely report that eighty percent of the civil legal needs of the poor are not presently met. Furthermore, funding for traditional sources of free legal services, including legal aid organizations, is increasingly under attack. As one of the largest employers of lawyers in the country, the private bar needs to become fully engaged in assuring access to justice for all citizens.”²⁵¹

Cummings, writing in 2004 suggests that: “[b]y forging new relationships between public and private actors, the advent of institutionalized pro bono holds out the promise of a “Third Way” solution to the dilemma of equal access to justice.”²⁵² Empirically, Cummings suggests:

“Pro bono has thus emerged as the dominant means of dispensing free representation to poor and underserved clients, eclipsing state-sponsored legal services and other nongovernmental mechanisms in importance.”²⁵³

Rhode, writing in 2008 rues that:

“It is a shameful irony that the country with the world's highest concentration of lawyers has done so little to make legal assistance available to low-income individuals who need it most [...] Lawyers, both individually and collectively, have a responsibility for the quality of justice that implies a responsibility for effective pro bono assistance.”²⁵⁴

Mandell, writing in 2010, pleads that:

“In order to serve low-income individuals in large numbers, the bar association must work with pro bono law firms to mobilize volunteer attorneys to assist with one-time events, such as a legal line or clinic work in addition to ongoing representation. Strategies must be deployed to encourage law firms, regardless of size, and corporations, regardless of concentration, to give back and assist. If these groups participate at a high level, true community change is possible.”²⁵⁵

²⁵¹ Justus, “Using Business Strategies,” 365.

²⁵² Cummings, “Politics of pro bono,” 99.

²⁵³ *Ibid.*, 1.

²⁵⁴ Rhode, “Lawyers’ Public Service,” 1436.

²⁵⁵ Mandell, “Pro Bono Service,” 598.

Roberts, writing in 2014, argues that:

“The civil legal assistance system in the United States is inadequate in providing low-income individuals [...] access to representation. As a partial solution to make lawyers more accessible to the poor, public and private employers should develop more robust pro bono services.”²⁵⁶

While there are a handful of examples of alternative views on the possible utility and orientation of law firm pro bono,²⁵⁷ there is clearly a strong normative and empirical linking of pro bono with civil legal aid.

What is apparent from all of the above, is the importance of the local context (historical and political) in determining how the pro bono resource is oriented. Intermediary organizations, recruitment considerations, progressive legal movements, the organized Bar and legal aid providers may all influence how Big Law Pro Bono is deployed, to which ends this resource is directed. One might expect therefore, that where Big Law Pro Bono is transplanted to a new region or jurisdiction, these factors may equally play a role in determining how this resource is deployed and we should not necessarily expect that the results would be the same as in the United States.

4 Conclusion

As set out in the introduction, the central objective of this thesis is to explore whether “Big Law Pro Bono” contributes to access to justice in Europe and whether normatively, it could. The core argument is that Big Law Pro Bono, as a practice and institution, has taken a unique shape in Europe, that is distinctly different from the shape of its US predecessor. As such, large law firm pro bono in Europe does not contribute to access to justice in Europe as this has been classically understood in the literature. And to fully perceive the way in which Big Law Pro Bono, as a resource, has been deployed in Europe, we need to adopt a much broader and more

²⁵⁶ Roberts, “From the War on Poverty to Pro Bono,” 350.

²⁵⁷ See, for example, Epstein, “Stricture and structure,” 1689; Montgomery, “Transactional Pro Bono Work,” 42; Daase, “Making the Client’s Peace,” 423–52.

nuanced definition of access to justice. This argument will be more fully explored in the next chapter.

In this chapter, we have established four crucial points. Firstly, we have established that Big Law Pro Bono can trace its origins to the United States and to progressive legal movements of the 1960s and 1970s. As such, it must be understood as a fundamentally American construct. Secondly, we have established that the literature on Big Law Pro Bono arose from the literature on the US public interest law movement and the broader literature on public interest law and cause lawyering which flowed from that. As a consequence, and due to the fact that Big Law Pro Bono has developed in the US, the existing literature on Big Law Pro Bono is primarily oriented towards the US context. Commencing from such literature, this thesis sits theoretically within the public interest law body of literature (particularly the recent revival of this research and its focus on the globalization of public interest law) rather than within the cause lawyering literature and consequently, is more concerned with practices, processes, organizational relationships and institutions than with questions of subjective meaning, identity and ideology.

Thirdly, we have established that the existing (praxis-oriented) literature on Big Law Pro Bono largely revolves around a number of key themes including the causes and origins of pro bono, the internal organization and structure of pro bono, law firm rationales for pro bono, the actors and roles within the pro bono universe, including pro bono clients and problems or issues with pro bono as a means of effectively delivering legal services to clients. The themes to be explored in this thesis relate to some of the central gaps in the existing literature on pro bono, which have been set out above. One of the most significant gaps in the literature, for the purpose of this thesis, relates to the globalization of Big Law Pro Bono as an institutionalized set of practice and functional roles (meaning how Big Law Pro Bono is being transported and practiced beyond the US). We have suggested that whereas certain features of Big Law Pro Bono are likely to be context transcending and present in any region or jurisdiction where Big Law Pro Bono is deployed, others are likely to be more context-specific and variable depending upon the specific location. Whether a feature falls into the former or the latter category likely depends upon whether that feature flows from the logic of Big Law itself (such as the preferences of multinational corporate clients) or from the logic of the local legal market (such as local Bar regulations or the prevailing system for the provision of legal services to the poor).

Finally, we have also argued that Big Law Pro Bono, unlike other forms of progressive lawyering is ideologically indeterminate. Moreover, an exploration of how Big Law Pro Bono was institutionalized in the US between the 1970s and the early 2000s has revealed that Big Law Pro Bono may also be historically and politically contingent. There are a number of consequences and implications of these findings. Firstly, just because Big Law Pro Bono took a certain shape in the United States and was oriented functionally towards the provision of civil legal aid, we cannot take for granted, without further exploration, that it would take the same shape when transplanted beyond the United States. Secondly, the shape that Big Law Pro Bono has taken in the US, has influenced the orientation of the literature which empirically and normatively conceives of Big Law Pro Bono as a solution to the justice gap (meaning civil legal aid). This presents further gaps in the existing literature, in terms of exploring how else Big Law Pro Bono is and might be constructed, i.e. which ends it might serve, beyond providing civil legal aid.

Now a question arises: if Big Law Pro Bono is not conceived of as ideologically oriented towards promoting access to justice (construed narrowly), what other ends might it serve? However, before we can address this question we must set the parameters for the exploration, both analytically and methodologically. Put simply, we need to address two essential questions in this thesis: what do I mean by “access to justice” and what do I mean by “Big Law Pro Bono”? These questions will be addressed in the following chapter where I will also set out the methodological approach taken in this thesis.

CHAPTER 2 – Revisiting Access to Justice and Big Law Pro Bono: Analysis and Method

In the Introduction and in the previous chapter, I presented the central objective of this thesis, which is to explore the emergence of a unique variant of Big Law Pro Bono in Europe, not focused on individual legal assistance to low income clients, akin to the model of Big Law Pro Bono that has been institutionalized in the United States, but rather, on providing technical and policy assistance to transnational human rights and European policy NGOs. The thesis must now map the contours and institutionalization of this variant of Big Law Pro Bono, explain why it has emerged and investigate the extent to which it contributes to access to justice in Europe. However, before I do so, I must first briefly explore the meanings of access to justice and Big Law Pro Bono that will be embraced in this thesis.

The objective in this second chapter, therefore, is to further prepare the ground before I can begin in earnest with an empirical investigation of the European variant of Big Law Pro Bono. Precisely, this will involve three separate tasks. Firstly, I must develop a new definition of “access to justice” (Section 1). The definitions of access to justice in the pro bono literature are often quite narrow, typically referring only to access to lawyers or legal services for low income individuals. For the purpose of this thesis, I would like to embrace a much broader definition, which will provide an analytical framework to facilitate the analysis and evaluation of atypical models of Big Law Pro Bono that have been less well explored in the literature. Secondly, I must develop a broader definition of “pro bono” in general, and “Big Law Pro Bono” in particular, so that we can more effectively locate and identify various atypical and less well explored kinds of Big Law Pro Bono work that are currently being conducted in Europe (Section 2). Finally, I must briefly set out the methodological approach to research in this thesis (Section 3).

All that follows, then, will help to further prepare the ground and enable me, in the following chapter, to begin exploring the antecedents to Big Law Pro Bono in Europe, i.e. pre-existing models of social justice lawyering and the broader historical and legal background context into which Big Law Pro Bono was transplanted, and against which it is taking shape in Europe.

1 What is Access to Justice?

Before I begin with the task at hand however, it is important to recall a few key points that were established in the first chapter. Firstly, it is important to remind ourselves of the fact that Big Law Pro Bono (rather than merely “pro bono” – meaning lawyers acting outside of the Big Law setting providing free legal services), traces its origins to the United States and to progressive legal movements of the 1960s and 1970s and as such, must be understood as a fundamentally American construct. Secondly, and most crucially for this chapter, we must recall that the literature on Big Law Pro Bono has emerged from the literature on the US public interest law movement and the broader literature on public interest law and cause lawyering which flowed from that. The consequence of this is that the existing literature on Big Law Pro Bono is primarily oriented towards the US context, which presents some limitations when seeking to build on this literature to explore Big Law Pro Bono in Europe. In what follows then, the objective is to identify the limitations with the US literature on Big Law Pro Bono, specifically in terms of how this literature conceives of “access to justice”.

Typically, when US lawyers and legal academics talk of access to justice, they are talking about ensuring that individuals (regardless of financial status) can effectively and meaningfully access and participate in the legal system.²⁵⁸ In the literature on pro bono, as explored in the previous chapter, “access to justice” has been understood quite narrowly, along these lines. Justus, for instance, in a characteristic example, writes:

“The compelling need for pro bono legal services from the private bar cannot be understated. Studies routinely report that eighty percent of the civil legal needs of the poor are not presently met. Furthermore, funding for traditional sources of free legal services, including legal aid organizations, is increasingly under attack. As one of the largest employers of lawyers in the country, the private bar needs to become fully engaged in assuring access to justice for all citizens. Law firms are in a unique position that allows them to draw on their expertise and extensive resources to help meet the legal needs of the indigent.”²⁵⁹

²⁵⁸ No doubt this is also the case for lawyers in the other Anglo-Saxon, common-law jurisdictions, certainly England and Australia. However, for the reasons already outlined, the focus here is on the United States.

²⁵⁹ Justus, “Using Business Strategies,” 365.

In this passage, Justus essentially conflates access to justice with civil legal aid (and the legal needs of the poor more broadly), something not uncommon in the pro bono literature.²⁶⁰ Indeed, access to justice is typically understood to be an objective that can be measured in terms of “more lawyers for poor and underrepresented groups.”²⁶¹ Even where scholars imply, by access to justice, not merely the access of the poor to greater numbers of lawyers, they refer to the access of the poor to the legal processes and legal remedies. For example, Burke and colleagues write:

“Other opponents of mandatory pro bono suggest that instead of merely increasing the indigent population's access to attorneys, perhaps efforts should concentrate on increasing their access to justice. Reforms which streamline matrimonial and housing courts, thus allowing indigents to appear pro se effectively, which provide more options for alternative dispute resolution, and which allow paralegals to assume a more active role in the provision of legal services, might be a more effective means for achieving the goal of equal access to justice.”²⁶²

The underlying assumption is that “social justice is available through procedural justice”.²⁶³ As explored in Chapter 1, the linking of access to justice with legal aid for the poor and underserved (civil legal aid in particular) in the US literature on pro bono is a consequence of the broader political and legal context within which discussions on pro bono and legal aid have taken place in the US. Boutcher, for example writes:

“President Johnson’s “War on Poverty,” [...] shifted pro bono from a form of noblesse oblige to a focus on “access to justice”— targeting direct legal services for the poor through the mobilization of government and legal services lawyers.”²⁶⁴

²⁶⁰ See, for example, Jacobs, “Pro Bono Work,” 509; Sandefur, “Lawyers’ Pro Bono Service,” 79–112; and Bartlett and Taylor, “Pro bono lawyering,” 260–80.

²⁶¹ Chen and Cummings, *Public Interest Lawyering*, 338. See also Cummings, “Politics of pro bono,” 148, “The story of pro bono is still being written. As trends of privatization, volunteerism, and globalization press forward, one can expect pro bono to be a growth industry in the years to come, not simply shaping the American system of free legal services, but informing the discussion about equal access to justice around the world. Questions about pro bono's effectiveness as a model for meeting the legal needs of poor and underserved groups will therefore take center stage.”

²⁶² Burke, Reagan, and Pearce, “Pro bono public,” 75.

²⁶³ Rhode, *Access to Justice*, 5, 6.

²⁶⁴ Boutcher, “Lawyering for social change,” 181.

Indeed, access to justice (understood as the provision of legal aid to the poor) emerged as a topic of discourse among the American legal profession between the 1960s and the 1990s during the rise and fall of the US civil legal aid system. In 1965, the US Office of Economic Opportunity (OEO) established the Legal Services Program. This expanded annual civil legal aid spending from under \$5 million to more than \$300 million within a fifteen-year period.²⁶⁵ Meanwhile, decisions of the US Supreme Court in 1963 and 1972 provided indigent persons accused of crimes a right to free representation.²⁶⁶ The mandate of the OEO Legal Services program was originally much broader than simply securing access to justice, construed narrowly as access to lawyers, legal services and legal processes and remedies. The founders of the program construed the objectives as securing substantive antipoverty goals (i.e. a justice through law and beyond law in the way that social and economic goods were distributed in American society).²⁶⁷ The first President of the OEO Legal Services Program, Clinton Bamberger, described the objective as "contribut[ing] to the War on Poverty" and "marshall[ing] the forces of law and the strength of lawyers to combat the causes and effect of poverty [and to] remodel the system which generates the cycle of poverty and design new social, legal and political tools and vehicles to move poor people from deprivation, depression and despair to opportunity, hope and ambition."²⁶⁸ It was hoped that this could be achieved through law reform work such as impact litigation, and grantees under the program were evaluated on the basis of such work.²⁶⁹ Nevertheless, a great deal of the spending also went to more conventional legal aid work which, by the time of the Carter administration, had succeeded the law reform objectives to become the primary mandate of the, by then renamed, Legal Services Corporation.²⁷⁰ However, in subsequent years, there has been virtually a complete rollback of civil legal aid spending in the United States. This, as a consequence of conservative political backlash against the early activist law reform work.²⁷¹ By the mid-1990s, successive Republic administrations and the US Congress had effectively wiped out the civil legal aid program, reducing funding to the lowest levels in the history of the program. Rhode, writing in 2004, lamented:

²⁶⁵ Abel, "Paradoxes of Pro Bono," 2443.

²⁶⁶ *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

²⁶⁷ Charn, "Celebrating the Null Finding," 2208.

²⁶⁸ *Ibid.*, 2209 (quoting Clinton Bamberger, Speech to the Nat'l Conference of Bar Presidents (Feb. 8, 1966)).

²⁶⁹ *Ibid.*

²⁷⁰ *Ibid.* 2210.

²⁷¹ Abel, "Paradoxes of Pro Bono," 2444.

“Unlike most industrialized nations, the United States recognizes no right to legal assistance for civil matters [...] The federal government, which provides about two-thirds of the funding for civil legal aid, now spends only about \$8 per year for those living in poverty. Less than 1 percent of the nation’s total expenditure on lawyers goes to help the seventh of the population that is poor enough to qualify.”²⁷²

The decimation of civil legal aid between the mid 1970s and the 1990s gave rise to a broader conversation on the legal left about access to justice and even a “right-to-counsel movement” among those promoting access to justice.²⁷³ As touched upon in Chapter 1, among access to justice advocates and the organized bar, pro bono increasingly began to be viewed as a replacement for the emaciated civil legal aid system and today represents around a third or a quarter of the civil legal aid available in the United States.²⁷⁴ Against this backdrop, it is perhaps unsurprising that access to justice has been defined narrowly, as the provision of free (civil) legal services to low income individuals in the pro bono literature (which, not by coincidence, only emerged in earnest in the mid 1990s, just as the civil legal aid system had been virtually wiped out).

However, if we look to the cause lawyering strand of the literature and the broader literature on access to justice, we can find criticisms of such procedurally oriented definitions of access to justice. For example, Sarat warns of exaggerated focus on, “ease of entry to legal institutions, rather than the nature of the justice they provide”.²⁷⁵ This would suggest the inclusion of substantive as well as procedural goals into any definition of access to justice. If we look beyond the US literature, to comparative literature on legal aid, for example, we can find slightly broader definitions along these lines (i.e. incorporating substantive as well as procedural goals). For example, Cappelletti and Garth define access to justice in the following terms:

“First, the system must be equally accessible to all; second, it must lead to results that are individually and socially just.”²⁷⁶

²⁷² Rhode, *Access to Justice*, 7.

²⁷³ Charn, “Celebrating the Null Finding,” 2211.

²⁷⁴ Cummings, “Politics of pro bono,” 32, 103.

²⁷⁵ Sarat, “Book Review,” 1912.

²⁷⁶ Cappelletti and Garth, “Access to justice,” 182.

This implies a justice not just in access, but also in outcomes. However, for some critics, even this might not be sufficient. From this vantage point, access to justice efforts must look beyond the legal system and the outcomes that it can produce and must have the aim to “reduce the unequal distribution of advantages in society.”²⁷⁷ This suggests a redistributive agenda that would require looking beyond the legal system to the reallocation of resources in society more broadly.

Ultimately, such criticisms present a significant challenge for US pro bono scholars and pro bono advocates. The US pro bono project (both the professional project and the academic project) has been closely bound up with the access to justice movement. This has been a consequence of the historical and political background context against which the pro bono project has taken shape (as explored in the previous Chapter and above). In doing so, it has embraced a narrow definition of access to justice. As Boutcher suggests, the consequences of this are that much of the literature (and pro bono advocates) “imagines a functionalist world in which inequality in the legal system can be alleviated if only pro bono resources are increased or better channeled to the right places.”²⁷⁸ He continues, “[a]ccordingly, much of the research on pro bono tends to focus on how much time is donated to pro bono by individual lawyers and law firms, or the “supply” side of the pro bono system.”²⁷⁹ There are certainly limitations to embracing this narrow definition of access to justice. For example, it means that the literature to date does not evaluate pro bono empirically or normatively beyond the provision of civil legal aid.

It would be useful here to return briefly to the discussion, in Chapter 1, on the pro bono literature and the cause lawyering literature. The objectives of cause lawyering have been variously described as “to challenge prevailing distributions of political, social, economic, and/or legal values and resources”²⁸⁰ and “altering some aspect of the social, economic and political status quo”²⁸¹. Indeed, as mentioned in Chapter 1, cause lawyering has been explicitly defined in contrast to so-called “conventional lawyering” (of which pro bono is said to be an

²⁷⁷ Felstiner, Abel, and Sarat, “Emergence and Transformation of Disputes,” 637.

²⁷⁸ Boutcher, “Lawyering for social change,” 191.

²⁷⁹ Ibid.

²⁸⁰ Sarat and Scheingold, *Cause Lawyering and the State*, 13.

²⁸¹ Sarat and Scheingold, *Cause Lawyering*, 4.

example).²⁸² Meanwhile, the objectives of public interest law have been described as “to provide legal representation to interests that historically have been unrepresented and underrepresented in the legal process”²⁸³, “to promote either substantive or procedural systemic goals”²⁸⁴ and, more recently, to “advance the interests and causes of constituencies that are disadvantaged in the private market or the political process relative to more powerful social actors”.²⁸⁵ While it is worth noting that public interest law, as both a scholarly and practical enterprise, has often been criticized for being overly concerned with procedural justice,²⁸⁶ over time, the broad objectives that have been attributed to public interest law have included both procedural (related to accessing the legal system) and substantive elements (related to the nature of justice provided by the legal system). In this vein, Cummings has distinguished helpfully between the “access” dimension of public interest law and the “policy” dimension.²⁸⁷ The access dimension relates to market-based inequality in the access of legal services and orients public interest law towards “providing no-cost or low-cost services to expand the entry of the poor into the legal system on an individual, case-by-case basis”.²⁸⁸ This is essentially equivalent to the definition of access to justice embraced within the pro bono literature, although not limited to civil justice. Meanwhile, the policy dimension relates to political inequality or “structural disadvantage” and obstacles or hindrances that prevent certain groups from “advancing collective interests through political channels”.²⁸⁹ The policy dimension orients public interest law towards impact litigation and law reform work.²⁹⁰ Indeed, the early legal practices from which the public interest law and poverty law movements originally emerged (in particular the legal campaigns of the NAACP and the likes of Charles Hamilton Houston and Thurgood Marshall) clearly had a strong orientation to towards what Cummings has framed as the policy dimension of public interest law i.e. systemic change, norm change, altering the status quo. Hamilton Houston described his objectives in terms of using the law “to force reforms where they could have no chance through politics” and “to use ...the law as an instrument available to [the] minority unable to adopt direct action to achieve its place in the community and the nation”.²⁹¹ Clearly such aspirations go well beyond merely providing

²⁸² Ibid.

²⁸³ Council for Public Interest Law, *Scales of Justice*.

²⁸⁴ Rabin, “Lawyers for social change,” 227.

²⁸⁵ Cummings, “Pursuit of Legal Rights,” 523.

²⁸⁶ See e.g. Esquivel, “The Identity Crisis in Public Interest Law”.

²⁸⁷ Cummings, “Pursuit of Legal Rights,” 523.

²⁸⁸ Ibid.

²⁸⁹ Ibid. 524.

²⁹⁰ Ibid.

²⁹¹ McNeil, *Groundwork*, 85.

access to the legal system and seem to anticipate social and political reform, perhaps even a reorganization of the social fabric and a redistribution of resources such as power and social and political capital. Similarly, as noted just above, the early objectives of the poverty law movement, as expressed by Clinton Bamberger, also went well beyond merely providing for a procedural justice and called for systemic change, using law to tackle the root causes of poverty.

When viewed in light of the broader literature and the ideological framing of public interest law or cause lawyering, the normative agenda established by academics and practitioners for pro bono appears limited. For my purposes in this thesis, I believe it would be more productive to tap into the broader public interest law literature and literature on the meaning of justice and fashion a richer definition of access to justice that responds to some of the criticisms and limitations identified above and allows me to make a wider assessment of the (possible) contribution of large firm pro bono to access to justice in Europe, perhaps capturing some of the subtler contributions and possibilities that would be missed if I were to rely on the narrow definition employed throughout much of the pro bono literature. This broader definition will ultimately provide me with an analytical framework to explore and evaluate the model of Big Law Pro Bono that has developed in Europe which, as previously indicated, varies somewhat from the US model.

Before we examine the definition, I would like to set out some of my working assumptions in all that follows. To recap, one of my core research questions is, “*to what extent could Big Law Pro Bono contribute towards access to justice in Europe?*”. Given the focus on Europe and the fact that most of the countries in which Big Law Pro Bono has been deployed in Europe to date have broadly (at least at the normative level) aspired towards liberal constitutional democracies, I am relying on an underlying notion of ‘justice’ (i.e. the norm to which people ought to have access) that is compatible with such political systems and the various norms that underpin them. As such, in all that follows, it should be noted that I take for granted a broadly distributive, relational and ideal notion of ‘justice’. On the one hand, I perceive justice as an on-going requirement for fairness and equality between individuals relative to one another in the processes constitutive of the administration of justice and the outcomes of those processes. On the other hand, I also take for granted that beyond the administration of justice, the norm ‘justice’ also implies fairness in the distribution of economic resources and social and cultural capital. Moreover, I take for granted that, as Rawls put it, justice is “the first virtue of social

institutions”.²⁹² Accordingly, I take for granted that justice is a matter of obligation for the institutions involved in the administration of justice.

In elaborating my definitions, I make heavy, virtually exclusive, reliance on the American political philosopher, John Rawls. Given my objective of getting away from the US-oriented definition of access to justice that has been embraced in the pro bono literature, this may seem an odd choice and needs some explaining. Primarily, I have chosen to rely on Rawls for three reasons. Firstly, because I believe that the philosophy of Rawls provides a comprehensive understanding of justice that incorporates the definitions embraced in the pro bono literature while also being broad enough to respond to the criticisms of such definitions discussed above. Secondly, because I believe that Rawls’ conception of justice also neatly captures many intuitive notions of justice that can be found in public and popular discourse (from the US and beyond) and I wish to develop a definition that builds out from such intuitive notions of justice. This because I believe that if Big Law Pro Bono is ultimately to be sustainable in Europe (or elsewhere), it must be judged in terms that are not overly technical or legalistic, but in terms that an average citizen can understand. Thirdly, Rawls’ conception of justice is incredibly rich and sophisticated, beyond what is necessary for my purposes, and consequently I believe that to rely exclusively on Rawls will be entirely sufficient and avoid unnecessary further complication in developing my analytical framework.

To begin with this task - defining access to justice - we might start by exploring the basic meanings of some of the key terms:²⁹³

- **Access:** a way of entering or reaching a place; permission, liberty, or ability to enter, approach, or pass to and from a place or to approach or communicate with a person or thing; freedom or ability to obtain or make use of something; a chance or right to have something; permission (legal or official) to have something.
- **Justice:** the fair treatment of people; the quality of being fair or reasonable; the quality of being just, impartial, or fair; the quality of conforming to law; the law and the way it is used or the administration of law; the maintenance or administration of what is just,

²⁹² Rawls, *Theory of Justice*, 3.

²⁹³ Definitions taken from the Oxford Student’s Dictionary (2002) and the Merriam-Webster online dictionary (2017).

especially by the impartial adjustment of conflicting claims or the assignment of merited rewards or punishments.

- **Law:** an official rule of a country or state that says what people may or may not do; a binding custom or practice of a community; a rule of conduct or action prescribed or formally recognized as binding or enforced by a controlling authority; the whole body of such customs, practices or rules; all the laws in a country or state.

Justice may refer either to a *norm* which is an abstract quality or a standard of treatment (with notions of fairness, impartiality, consistency, predictability and reasonableness) or to the socially constructed *processes* for resolving disputes, determining the customs, practices or rules within a given defined community (by reference to such a norm) and enforcing such customs. Meanwhile *access* refers to the freedom, ability or rights of people to make use of something.

Access to justice then, can be understood as the freedom, ability or right of people to: a) make use of the socially constructed processes in a given community for defining and enforcing the rules and resolving disputes and conflicting claims; and b) be treated in a way that conforms to a norm of fairness, impartiality, reasonableness, in the context of the aforementioned processes.

That is to say that access to justice refers to *both* the accessibility of the processes (for rulemaking, rule enforcement and conflict resolution) and the accessibility of the norm itself (both within the context of the aforementioned processes and within society more broadly).

From this interpretive exercise, we can identify a “narrow” definition of access to justice and a “wide” definition.

The narrow definition, which is the closest to how the term has been defined in the pro bono literature to-date, revolves simply around the formal and substantive *accessibility* of the processes for administering justice (rulemaking, rule enforcement and conflict resolution) to persons who are subject to that justice. Here we might think of the access of individuals to the courts and other more or less institutionalized forms of conflict resolution (and to legal advice and representation by extension), to the legislative process (also by proxy through the electoral process) and to the systems of law enforcement (and the negative and positive protections afforded to individuals through those systems). This definition ties in with what Cummings has

described as the “access” dimension of public interest law insofar as it is concerned chiefly with addressing inequalities in the access to the legal system and legal services.

Meanwhile the wide definition implies not only *access* to these processes but that the treatment of individuals having accessed these processes and the outcomes they receive must conform to a certain normative standard (fairness, impartiality, consistency, predictability and reasonableness). Here we refer to access to the norm, within the context of the processes for administering justice. This definition embrace what Cummings has referred to as the “policy” dimension of public interest law, insofar as it is concerned with structural and systemic disadvantages that result in injustice.

Before we probe these definitions, a further point to note is that when I discuss ‘*outcomes that may tend to increase access to justice*’ below, I am anticipating that such outcomes may be instigated or provoked by any members of a relevant political community who are subject to the administration of justice in that community. However, due to the overall focus of this research, I have in mind primarily outcomes that can be provoked by actors directly and indirectly involved in the administration of justice and in particular, rule makers, law enforcers, decision takers, and especially, the legal profession and civil society.

Finally, it should also be clear that the definitions explored below are overlapping and are not to be construed as entirely severable from one another. We can now explore, in a little more detail, these definitions of access to justice in turn.

1.1 The narrow and “PBL” definitions of access to justice: no access, no justice

"Curia pauperibus clausa est" [The courts are closed to the poor]

– Ovid (Roman poet)²⁹⁴

"Si la justice ne se vend pas, elle coûte cher, et il faut être bien riche pour obtenir gain de cause."

²⁹⁴ Quoted in: Cappelletti, “Legal Aid,” 347.

– Stanisław Leszczyński (King of Poland)²⁹⁵

“There never will be complete equality until women themselves help to make laws and elect lawmakers.”

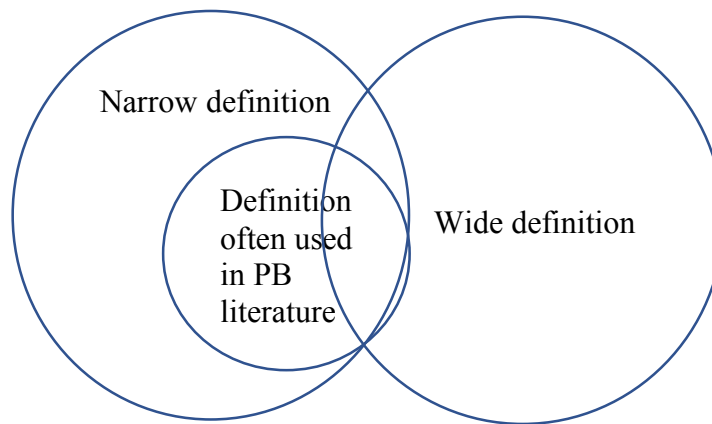
– Susan B. Anthony (Social reformer, suffragette and women’s rights campaigner)²⁹⁶

These quotes illustrate the intuitive sense of access to justice (or rather the lack thereof) I refer to with the ‘narrow definition’. In the manner in which I understand it, the narrow definition of access to justice is purely about formal and substantive *accessibility* in a structural sense (relative to given procedures). The definition merely describes a structural position inhabited by a relevant individual (or individuals) or a legal entity, relative to certain procedures. Here, the norm ‘justice’ (fairness, impartiality, reasonableness) is implicated only insofar as it relates directly to the question of the formal or substantive accessibility of the processes (i.e. *can individuals fairly and impartially access the conflict resolution, rulemaking and rule enforcement processes?*). The quotes above all suggest that, where there is no equal access to the processes of justice, there can be no justice. On this definition, the central question is not: *are the processes just?* And by extension: *what is justice* (fairness, impartiality, reasonableness)? Rather, the central question is: *what structural impediments exist that render it difficult or impossible for individuals to access the conflict resolution, rulemaking or rule enforcement processes?* Of course, the two questions are not hermetically sealed off from one another. But one is primarily focused on access to certain *processes* and the other on access to a *norm* (justice) as manifest in various processes and the outcomes thereof. See a depiction of the relationship between the various definitions at Figure 1 below.

²⁹⁵ Leszczyński, Stanisław I, *Lettres Inédites*.

²⁹⁶ Encyclopedia Britannica, *Annals of America*, 147.

Figure 1



Barriers to access to justice, defined in this way, would include any structural impediment that renders it difficult or impossible for an individual within a relevant political community to formally or substantively access the conflict resolution, rulemaking and rule enforcement processes in that community. This could be anything from laws prohibiting certain segments of a community to pursue legal remedy, retain a lawyer or to vote, to the prohibitive cost of retaining a lawyer or going to court or the lack of accommodations made for persons with disabilities, migrants or children in accessing legal institutions. Importantly though, a contribution towards improving access to justice, defined in this way, is focused primarily on the structural barrier and not on an individual's treatment having accessed and made use of the relevant processes or her experience in participating in the administration of justice (i.e. the process, beyond accessibility, and the outcomes). That is to say that it is focused primarily on removing formal and substantive barriers to the *processes* of justice (making the process more *accessible*).

Concrete examples of outcomes that may tend to increase access to justice (defined narrowly) would include:

- The provision of information, advice or representation to individuals who would otherwise not have the means to effectively engage in the judicial or electoral processes.

- The provision of resources (information/education or funds) to individuals (e.g. migrants) that would better equip them to understand their rights and obligations with respect to the processes for administering justice.
- The introduction of a law requiring that all individuals have access to legal representation in criminal or civil proceedings;
- The removal of a legal prohibition on certain groups of individuals from voting in elections; or
- The introduction of a requirement for reasonable accommodations for physically or intellectually disabled persons wishing to take advantage of their right to vote (e.g. online voting, assisted voting or wheelchair accessible polling stations).

In terms of actions that can be taken to provoke such outcomes, these might be divided into actions for individuals (e.g. directly assisting an individual client by providing her with legal advice), and actions on behalf of individuals or groups (e.g. advocating for a law that would require the provision of legal advice to low-income individuals).

They might also be divided into direct actions (that remove the relevant barrier itself) e.g. providing legal information, advice or representation to an individual who otherwise would not be able to effectively participate in the judicial process, or removing a law prohibiting certain individuals from voting. Or, such actions might be indirect (contributing or likely to contribute to the removal of the barrier) e.g. *advocating or lobbying* for a law that would require that all individuals have access to legal representation in criminal or civil proceedings.

We might further categorize them by saying that all such actions are internal to the processes of justice rather than external. This is to say that they all work within, and accept the legitimacy of, the existing processes and the norms that underpin them. Such actions may change rules and practices but will not immediately change the underlying norms upon which such rules and practices are based.

The most truncated definition of access to justice, and the way in which the term is typically construed in the pro bono literature, is direct and internal actions for individual clients. That is to say, providing individual clients with assistance that *directly* enables them to participate in the existing processes that constitute the administration of justice. I will refer to this as the

“**PBL Definition**” (or pro bono literature definition) of access to justice, as a subset of the narrow definition. Insofar as pro bono (and Big Law Pro Bono, in particular) contributes to access to justice in the US by constituting a “significant part of [America’s] civil legal aid structure, accounting for between one-quarter and one-third of full-time equivalent lawyer staff”,²⁹⁷ it does so within the PBL definition and the narrow definition. This also implies, as discussed above, that insofar as the existing pro bono literature has explored the extent to which Big Law Pro Bono contributes to access to justice, it has done so mainly with respect to the PBL definition and the narrow definition.

1.2 The wide definition of access to justice: whose justice?

“Kleine Diebe hängt man, große läßt man laufen.”

– German Proverb²⁹⁸

“The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.”

– Anatole France (French poet, journalist, and novelist)²⁹⁹

“Is there no danger that an African accused may regard the courts not as impartial tribunals, dispensing justice without fear or favour, but as instruments used by the white man to punish those amongst us who clamour for deliverance from the fiery furnace of white rule. I have grave fears that this system of justice may enable the guilty to drag the innocent before the courts. It enables the unjust to prosecute and demand vengeance against the just. It may tend to lower the standards of fairness and justice applied in the country's courts by white judicial officers to black litigants. This is the first ground for this application: that I will not receive a fair and proper trial.”

– Nelson Mandela (South African anti-apartheid activist and political leader)³⁰⁰

²⁹⁷ Cummings and Rhode, “Managing pro bono,” 2368.

²⁹⁸ Simrock, *Die Deutschen Sprichwörter*.

²⁹⁹ Quoted in: Shelden, *Our Punitive Society*, vii.

³⁰⁰ Mandela, *Struggle is my Life*, 139.

"If one really wishes to know how justice is administered in a country, one does not question the policemen, the lawyers, the judges, or the protected members of the middle class. One goes to the unprotected--those, precisely, who need the law's protection most! --and listens to their testimony."

– James Baldwin (American novelist and social activist)³⁰¹

The wide definition of access to justice, illustrated by the above quotes (which all beg the question: *whose justice?*), goes beyond the question of formal and substantive *access* to the processes that define the administration of justice, to look at the standard of treatment that an individual (or individuals) receive/s having accessed and participated in those processes. Like the narrow definition, this definition also describes a *structural* position of an individual (or group of individuals), but here, the structural position is relative to the norm in the given context. Here we are talking about access to the norm ('justice': fairness, impartiality, reasonableness) within the context of the conflict resolution, rulemaking and rule enforcement processes as discerned from the fairness of those processes (beyond the question of accessibility) and the fairness of the outcomes of those processes. Consequently, this requires us to look not just at *access* to the processes, but at the processes themselves and the norm 'justice' for the sake of which they operate. The central question is: *is the administration of justice fair, consistent, impartial, reasonable* (and by extension: *what is justice: fairness, impartiality, reasonableness*)? Put another way, "Does it make sense to talk about access to justice if the justice that is made accessible is not worth obtaining?"³⁰²

Barriers to access to justice, defined in this way, will be systemic or structural defects inherent in the norm (justice) for the sake of which the institutionalized rulemaking, rule enforcement and conflict resolution processes operate. Any defects in the norm will manifest also in the processes. Such defects will structurally prevent these processes from delivering justice to individuals (or groups of individuals) who engage with them. Such barriers could include, for example, systemic racism, sexism, classism, political bias, authoritarianism or corruption in the rulemaking, rule enforcement or conflict resolution processes. Such barriers would, for

³⁰¹ Baldwin, *Collected Essays*, vol. 2, 445.

³⁰² Sarat, "Book Review," 1919.

example, systematically prevent (certain) individuals from being treated fairly, impartially and reasonably within the institutionalized processes for the administration of justice.

Crucially, any contribution towards access to justice, defined in this way, requires more than increasing access to the rules and practices related to the administration of justice; it requires the transformation of those processes and, by extension, the transformation of the norm itself (as it operates in the institutionalized rulemaking, rule enforcement and conflict resolution processes). Norm change may happen in tandem with changes to rules and practices; it may be anticipated by changes to rules and practices or may require such changes. However, changes to the norm and changes to the processes, although heavily intertwined, are separable. (N.B. I am taking for granted here that, in reality, the processes of the administration of justice cannot guarantee what Rawls would call a ‘perfect procedural justice’, i.e. procedures such that, if perfectly followed, would guarantee a just outcome.)³⁰³ An example may suffice to clarify all of the above. Let us imagine that community X is made of two groups: the monied elites and the underprivileged poor. Let us further imagine that the rulemaking process in community X is beset with systemic corruption such that the process is effectively captive to the interests of the monied elites. To improve access to justice in community X it will not be sufficient to increase the formal or even substantive access of the underprivileged poor to the rulemaking process (e.g. by introducing a requirement for the legislature to consult with the underprivileged poor, or their representatives). This would improve their access to the process which may help significantly, at least in improving and equalizing flows of information to the legislature, but so long as the process remains corrupt (e.g. rule makers continue to take bribes), it will continue, at least some of the time, to produce corrupted outcomes that favor the monied elites. Even where the underprivileged and the elites have both formal and substantive parity in access to the rulemaking process, or where the underprivileged have greater access, so long as the practice adhered to by rule makers (e.g. kept in place by a system of bribery and malfeasance) is to prioritize the interests of the elites, the outcomes will continue to be corrupted. This is because the process remains corrupted. However, even if we were to a) perfect the process by eliminating all corruption in the process (e.g. by prohibiting bribery and malfeasance and punishing all private actors and public officials found to have engaged in such practices) and b) perfect access to the process by ensuring full parity in access to the legislature (for both the monied elites and underprivileged poor), we still could not *guarantee* a just

³⁰³ Rawls, *A Theory of Justice*, 74.

outcome. This is for a host of possible reasons. Most importantly, the normative standard for the sake of which the process exists, may itself still be corrupted (unjust: unfair, biased, unreasonable). I.e. even if the rule makers refrain from taking any bribes and fully consult with both the monied elites and the underprivileged poor, they may still unwittingly or willfully prioritize the interests of the monied elites when deliberating and generating legislative outcomes. In this way, the norm, ‘justice’, continues to be defined for the sake of the monied elites, and so the processes will continue, at least some of the time, to produce outcomes which, although procedurally just, are substantively just only from the vantage point of the elites.

In the above example, to achieve the systemic or structural change necessary to expand access to justice, two deeply interdependent outcomes need to be achieved: a) systemic changes need to be made to the processes to make them fairer, more impartial, more reasoned and so on (making the process more *just*); and/or b) there needs to be a redefinition of what justice, fairness and reasonableness actually mean in the context of the relevant processes (making the norm (outcomes) more *just*).

In both cases this requires going beyond the structural position of individuals relative to the processes vis-à-vis accessibility and changing the structural position of individuals relative to the norm as it manifests in the given context. This, in all likelihood, will require some degree of norm change (i.e. a redefinition or reinterpretation of what justice means).³⁰⁴ Consequently, before I delve into the kind of outcomes and actions that might promote access to justice (in the wide definition), it is important to first understand clearly what is meant by ‘norm change’. How can this be achieved?

To understand this more clearly, we must first note that implicit within the norm, *justice*, is a self-referential assumption of authority *for the benefit of* a hidden supra-subject. The norm *speaks* and *listens*, for and to, an undisclosed *supra-subject*. This hidden supra-subject of the norm is manifest in the form of an always assumed, hidden and all-inclusive first-person plural. A hidden ‘We’ that is the subject *for the sake of which* the norm (justice) *is* and, by extension, for the sake of which the processes defining the administration of justice exist. Put another way, the processes for conflict resolution, rulemaking and rule enforcement are mechanisms

³⁰⁴ Other than in the purely theoretical case where there is universal agreement on the meaning of justice and the standard of fairness but this is not reflected in the processes mandated to administer justice.

by which *we* articulate, interpret and apply the norms *we* have given ourselves. It is precisely through this fictitious suspension of the ‘I’s’ and the ‘you’s’ and the assumption of authority by the all-inclusive ‘we’, that the norm, ‘justice’, can be deemed legitimate.³⁰⁵ As Rawls has posited, a constitution can only be said to be legitimate when it is a constitution ‘*which all citizens as free and equal may reasonably be expected to endorse*’. In the aspirational impossibility of the ‘*may reasonably be expected to*’ lies both the assumption of authority by the ‘we’ and the source of legitimacy of the norm. It is, therefore, not *his* justice or *my* justice, it is *our* justice.³⁰⁶ It follows then, that norm change requires that this legitimacy be questioned or suspended. It requires that the ‘I’s’ and the ‘you’s’ withdraw the authoritative force of the ‘we’ or that this is done on their behalf and with their consent (actual or implied). The ‘we’ must then be reconstituted, its authority restored.

Returning to the example above, the monied elites which have captured the rulemaking process in community X are the supra-subject for the sake of which the norm, justice, *is*. They are the ‘we’ and any justice is *their* justice. Improving access of the underprivileged poor to the rulemaking processes will, in all likelihood, only increase access to the justice of the elite. To meaningfully increase access to justice for the poor in community X requires that the legitimacy of this justice be questioned and that the norm be suspended and reconstituted such that the poor are (more fully and equally) included within the ‘we’.

Norm change, so defined, is unstructured and happens gradually (over years, decades or even centuries) throughout the whole body of the institutionalized rulemaking, rule enforcement and conflict resolution processes (from top down and bottom up). There may be catalysts or defining moments but it is difficult (perhaps impossible) to pinpoint a concrete instance of norm change. Returning to the example, even a revolution in community X such that the monied elites are overthrown and their grasp on the rulemaking process is eliminated, of itself, is only a fact constituting evidence of possible norm change. So long as the norm adhered to by rule makers is to prioritize the interests of those with money, the outcomes will continue to

³⁰⁵ Christodoulidis, “Objection that cannot be heard,” 186.

³⁰⁶ Of course, there is nothing new in this. For Lyotard, “[t]he republican regimen’s principle of legitimacy is that the addressor of the norm, *y*, and the addressee of the obligation, *x*, are the same.” Lyotard, *Le Différend*, 98. For Habermas “[j]ust those norms are valid to which all possibly affected persons could agree as participants in rational discourse.” Christodoulidis, “Objection that cannot be heard,” 189. And for Rawls, a constitution can only be said to be legitimate when it is a constitution “which all citizens as free and equal may reasonably be expected to endorse”. Rawls, *Political Liberalism*, 137.

be corrupted. Norm change itself can only be evidenced on an ongoing basis by the treatment of individuals relative to one another and having accessed and made use of the processes related to the administration of justice and the outcomes of those processes over time.

Having reviewed what is meant by norm change and how it takes place and how to identify it, we can now return to the question of what would be concrete examples of contributions to access to justice (defined more widely). As discussed above, to contribute towards access to justice, defined in this way, is to either: a) contribute to systemic changes to the institutionalized processes of conflict resolution, rulemaking and rule enforcement to make them fairer, more impartial, more reasoned and so on (making the process more *just*); and/or b) contribute towards a redefinition of what justice, fairness, reasonableness actually mean in the context of the relevant processes (making the norm (outcomes) more *just*).

These two sets of outcomes are so deeply interrelated that it does not make sense to separate them when providing concrete practical examples. However, conceptually they are separable insofar as the former is geared towards improving the processes themselves vis-à-vis the norm (i.e. procedural justice) and the latter is geared towards improving the outcomes of those processes vis-à-vis the norm (i.e. substantive justice). Examples of outcomes that might enhance access to justice, as defined here, include:

- The introduction of wide-ranging legislative and/or policy reforms seeking to render particular aspects of the conflict resolution, rulemaking and rule enforcement processes more just (e.g. the introduction of a rule requiring all legislative proposals to be submitted to an impact assessment in relation to the rights of children);
- Constitutional reform or reinterpretation rendering either the processes or the (likely and possible) outcomes more just (fairer, more equal, more impartial, more consistent, more reasonable, etc.) (e.g. a change to the constitution adding sexual orientation as a status to be protected under the guarantee of equal treatment under the law);
- The reallocation of resources distributed by the institutions engaged in the administration of justice to render such allocation more just, e.g. in respect of marginalized interests (such as, racial, linguistic, cultural or gender minorities) or diffuse interests (such as environmental or consumer protection) (e.g. a commitment to

increase the allocation of resources for law enforcement in disadvantaged and underserved communities by 50%);

- The consistent removal and punishment by the institutions engaged in law enforcement of public officials engaged in unjust practices (e.g. in terms of corruption or bias); or
- A culture shift among officials engaged in the administration of justice, bringing about more equitable views and practices.

By their very nature such outcomes transcend individual clients and aim at systemic change. Consequently, the actions that provoke such actions are not actually carried out directly for individual clients. However, the types of actions that might provoke such outcomes can be subdivided into internal actions (tacitly accepting and working within the existing processes/norms) and external actions (rejecting and working beyond the existing processes/norms). An example of an internal action might be impact litigation or lobbying aimed at bringing about constitutional reform. An example of an external action would be civil disobedience or armed conflict aimed at redistributing public resources in a more just fashion.

Importantly, as should be evident from the above, the existence of such actions is not by itself probative of their contribution towards norm change and consequently also not probative of their contribution towards access to justice. Consequently, all such actions are **indirect**. However, such actions, taken together with any number of potential contributing factors to norm change may indeed be strong evidence that such actions have contributed towards access to justice. For example, where impact litigation, lobbying or advocacy aimed at the reallocation of public resources in favor of marginalized interests is accompanied by a legal or political commitment from the institutions mandated to administer justice to, in fact, shift public resources away from discriminatory forms of public service provision, and where there is also follow-up, in terms of the actual redistribution of resources, this would be strong evidence of norm change and an expansion of access to justice (although still not conclusively probative).

1.3 Conclusion: Access to Justice Beyond Civil Legal Aid

In articulating an expanded definition of access to justice in this section, the aim, as set out above, has been to move beyond the rather narrow definition embraced in the pro bono literature which essentially equates access to justice with civil legal aid. The three-part

definition set out above allows us to explore and appreciate the contribution of Big Law Pro Bono to access to justice beyond civil legal aid. Indeed, although it has not been extensively explored in the pro bono literature, clearly there are other ends which Big Law Pro Bono pursues beyond filling the “justice gap” (through the provision of civil legal aid) and the business imperatives explored in Chapter 1 (such as training, recruitment, marketing, client development and so on).³⁰⁷ For example, impact litigation oriented towards norm change (as discussed under the “wide definition” above) has also been a significant objective within Big Law Pro Bono Practice. In a 2007 survey of over 50 of the leading US public interest legal organizations, Deborah Rhode found that “almost all of the large national organizations relied heavily on pro bono counsel for impact litigation, and involved them in at least half of their major cases”.³⁰⁸ Yet, such pro bono collaboration between pro bono lawyers and cause organizations has not been significantly explored in the literature, possibly because pro bono has largely been understood functionally as a solution to the “justice gap”. Similarly, promoting rule of law in developing countries through providing training to lawyers and judges or law reform efforts also pursues norm change and has been the objective of pro bono efforts by large law firms and, yet again, is not significantly explored in the literature.³⁰⁹

As we shall see in Chapter 4, Big Law Pro Bono in Europe does not contribute to access to justice if we construe access to justice in terms of civil legal aid. Only if we adopt a broader definition, as set out above, can we begin to comprehend which purposes (beyond business imperatives) Big Law Pro Bono in Europe might be pursuing.

³⁰⁷ For alternative perspectives on the possible orientations of Big Law Pro Bono, see, for example, Epstein, “Stricture and structure,” 1689; Montgomery, “Transactional Pro Bono Work,” 42; Daase, “Making the Client’s Peace,” 423–52.

³⁰⁸ See e.g. Rhode, “Public interest law: The movement at midlife,” 2070.

³⁰⁹ See Daase, “Making the Client’s Peace,” 423–52.

2 What is Pro Bono?

In the previous Chapter, I noted that “pro bono” had become something of a term of art in the literature. Moreover, I noted the role played by the ABA in defining pro bono in contrast to the figure of the more activist “public interest lawyer” or “cause lawyer” (as the term has been used in the literature). That is to say, the ABA sought to define pro bono in such a way as to re-draw the lines of public service around more conventional professional norms rooted in the principle of neutrality. They sought to fashion institutionalized pro bono as a replacement for the decimated civil legal aid system. The definition embraced by the ABA definition – which essentially implies the provision of professional legal services, by the private bar, at no cost and for no remuneration to low income clients – has been largely embraced in the pro bono literature (if not explicitly, then by implication, insofar as pro bono is discussed both normatively and empirically in terms of the provision of civil legal aid – as discussed in Chapter 1).

For this thesis, I want to articulate a basic broad definition which will then be further substantiated by reference to structure, organization and rationale of pro bono in practice. I have decided to do this for a few reasons. Firstly, because unlike the US, there is no supranationally (federally) agreed upon definition of pro bono, relevant across all European jurisdictions, and consequently, I require a loosely fitting definition that can capture the various types of pro bono work being carried out by large law firms. Secondly, as discussed, I believe that the definition that has been implicitly embraced in the literature on pro bono is too narrow and limits the extent to which pro bono can be analyzed and evaluated both empirically and normatively. Accordingly, in line with my objectives in this thesis, a broader definition would be preferable.

First to articulate my basic definition, we might begin by looking at the basic meanings of the component parts. We can see a couple of possible meanings emerging:³¹⁰

- **Pro** [Latin]: *on behalf of; for; about; according to; as, like.*

³¹⁰ Definitions taken from the University of Notre Dame: Latin–English dictionary, by William Whitaker (2010), the Oxford Student’s Dictionary (2002) and the Merriam-Webster online dictionary (2017).

- **Bono** [Latin]: *good; moral; honest; brave.*
- **Pro Bono** [contemporary English usage]: being, involving, or doing professional and especially legal work donated especially for the public good; work undertaken without charge, especially legal work for a client on low income.

On the one hand, if we take the Latin definition seriously, then “pro bono” literally means, *for good*. The contemporary equivalent of this first definition might be *professional work donated (i.e. at no cost) for the public good*.

A second definition, which perhaps reflects the most common understanding of the term in Western legal circles today, takes into account the position of the beneficiary of the work more than the objective, i.e. *work undertaken without charge for low income clients* (with no specification as to whether the work is undertaken for the public good, although perhaps this is implied).

The definition that I would like to use in this thesis will borrow from both of the above. I would like to define pro bono as:

Legal work undertaken for the public good, at below market rates, for recipients who:

- a) cannot afford to pay;*
- b) due to the scarcity of financial resources or the limited value placed on the relevant legal services relative to other goods and services, would not pay; or*
- c) would otherwise not be able to source such services elsewhere on the open market.*

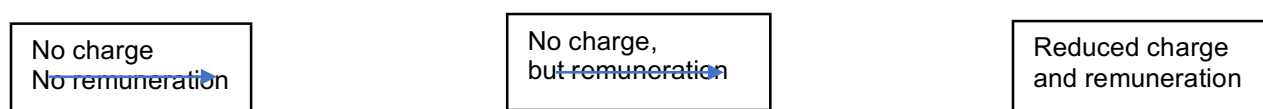
A first point to note about this definition is that the legal work must be for the “public good”. As discussed in Chapter 1, what the “public good” or the “public interest” actually means has been contended for decades.³¹¹ In this paper I have no intention of resolving that debate. I will understand legal work undertaken for “the public good” subjectively as any legal work that is carried out: a) for a recipient that is reasonably perceived (by the person carrying out the work) as in need of legal help but without the resources or sophistication to directly source such help;

³¹¹ For a thorough review of such debates, see Cummings, “Pursuit of Legal Rights,” 516–25.

or b) in the interest of a cause, whether political, social, religious or otherwise; and c) where the possibility of benefiting such recipient, or contributing to such cause is *one of* the primary reasons for carrying out the work. A second point to note about the above definition is that it uses the word “recipient” rather than the word “client” or “individual”. This is because across the range of practices that I wish to capture with the term “pro bono”, there are a range of possible recipients, and the relationship cannot always be characterized straightforwardly as “lawyer-client”. These include: individuals; actual and imagined groups (whether marginalized or minority groups based on gender, race, religion, ethnicity, etc. or diffuse groups such as consumers, refugees, the aged, children, Dutch citizens, animals, EU citizens or even citizens of the world); nonprofit entities and associations including, charitable organizations, civil society groups, membership clubs and professional organizations; private sector entities such as corporate foundations, social investment funds, small and medium-sized social enterprises; academic actors such as students, academics and academic institutions; public benefit institutions (e.g. UN agencies and international organizations); and countries and government departments (typically developing and transitional countries). All of these categories of recipients can benefit from pro bono legal services in the way I wish to define it.

The third point to note about the above definition is that, except for requiring that the services rendered are provided at below market rates, it leaves open the question of whether the legal services are undertaken with or without charge and the question of whether the lawyers providing the services are remunerated in any way for such services. These are, of course, two separate points. For example, lawyers may provide services free of charge and still be remunerated (e.g. by the state) or they may provide the services at no charge and receive no remuneration. For the various models of pro bono I wish to explore in this thesis, charge and remuneration exist on a continuum (see below) from: 1) no charge/no remuneration; to 2) no charge, but remuneration; and 3) reduced charge and remuneration.

Figure 2



The final point to note about the above definition, is that it includes not only work carried out for recipients who cannot afford to pay, but also work carried out where the recipient would not pay (due to the scarcity of financial resources or the limited value placed on the relevant legal services relative to other goods and services) or where the recipient would otherwise not be able to source such services elsewhere on the open market. The point here is to better capture pro bono work undertaken for clients with varying amounts of financial resources and reasons for relying on pro bono legal services.

2.1 What types of work?

Now that we understand broadly what is meant by pro bono, a series of other questions naturally arise beginning with: *what types of work can be carried out and what types of services can be rendered?* The easy answer is that any work that could be carried out for paying clients and any services that could be rendered for them, can equally be carried out for pro bono clients. As explored in Chapter 1, the focus of much of the existing pro bono literature has been on work carried out for low income clients. However, the literature does explore some other kinds of pro bono work including: advocacy and law reform work undertaken for cause organizations,³¹² transactional work undertaken for non-profits, social enterprises and small business,³¹³ and rule of law oriented work (such as drafting legal documents, research and education) in developing and transitional countries.³¹⁴ In what follows, I will set out some examples of the types of work I wish to include under the definition of pro bono in this thesis, including those types identified in the literature and some others.

A first type of pro bono work relates to information, advice and representation. Recipients of pro bono may benefit from advice and information (i.e. the provision by lawyers of guidance on legal or quasi-legal questions and issues to their clients, whether individuals or legal entities) and representation (i.e. the representation of clients, whether individuals or legal entities, in formal or informal legal proceedings, before administrative or political bodies and in transactions and negotiations). A second type of pro bono work might be categorized broadly as corporate support. Legal entities that are recipients of pro bono may require a great deal of

³¹² See, for example, Cummings, “Politics of pro bono,” 45–49; and Boutcher, “Lawyering for social change,” 179–96.

³¹³ See, for example, Baillie, “Fulfilling the Promise,” 1543; Epstein, “Stricture and structure,” 1689; Morsch, “Discovering Transactional Pro Bono,” 423; and Montgomery, “Transactional Pro Bono Work,” 42.

³¹⁴ See, for example, Daase, “Making the Client’s Peace,” 423–52.

legal support as incorporated legal entities, relating to their legal structure and governance, employment practices, tax obligations, financing, intellectual and real property rights, commercial transactions and so on. Thirdly, lobbying and legal and policy advocacy can also be done on a pro bono basis by large firms. Pro bono work may involve engagement in the policy process and the promotion of policy and legal reform. Practically speaking, this might involve preparing position papers, submitting Freedom of Information requests and engaging in other administrative law proceedings, writing to public officials, reviewing existing legislation or drafting new legislation and legislative proposals, or engaging in strategic litigation and other forms of judicial engagement. Yet another broad category of pro bono work includes research and drafting. To some extent, legal research and legal drafting will be required in relation to most forms of legal work. However, in the context of pro bono, research or drafting might often be stand-alone tasks resulting in short memos, extensive reports or submissions to e.g. human rights bodies.

Evidence gathering, fact-finding and monitoring form another type of pro bono work. Pro bono work might involve researching the practical and lived experience of the law e.g. the gathering of evidence in relation to human rights violations, or monitoring the implementation of specified legislation. Finally, pro bono lawyers also engage in training and legal empowerment. Recipients of pro bono might benefit from training on legal issues. Such training may be fairly basic and focus on legal writing and research or basic constitutional rights, or might be more advanced and focus on data protection or the right to asylum.

2.2 Who provides pro bono?

The next question to arise is, who provides pro bono? The focus of much of the literature (and this thesis) is on large law firms (Big Law). However, before narrowing down our focus to Big Law Pro Bono I would like to at first embrace a broader definition. Attention has been variously paid in the literature to other providers of pro bono (beyond Big Law) including sole practitioners and small law firms³¹⁵ and law schools.³¹⁶ Possible providers of pro bono (in the way that I have defined it here) include: sole practitioners (individual lawyers running their

³¹⁵ See, for example, Granfield, “Meaning of pro bono,” 113–46; and Levin, “Pro Bono Publico,” 699.

³¹⁶ See, for example, Deinard et al., “Providing legal services,” 463; Barry, “Accessing Justice,” 1879; Chambers and Adcock, “Learning and Serving,” 1056; Davis, “Social Justice and Legal Education,” 85; and Bowman, “Engaging First-Year Law Students,” 586–99.

own practices); small and medium sized law firms (local, regional and national law firms of between 2 and 500 lawyers); Big Law (national and international law firms of between 500 and several thousand lawyers); the organized Bar (local, regional, national and international Bar associations); law schools and academia (law students acting independently, law clinics, junior researchers and law professors); professionalized civil society (human rights organizations, women's groups and other non-profits and civil society groups with a strong legal orientation); state institutions (municipal governments and state funded legal aid organizations); the Church (various institutionalized, quasi-institutionalized and informal religious organizations); and membership organizations (e.g. trade unions and other professional organizations).

2.3 What is the rationale for pro bono?

As explored in detail in Chapter 1, there can be several law firm rationales for undertaking pro bono work, which have been identified in the literature. These include: enlightened self-interest in maintaining the reputation of the legal profession (the idea that pro bono work can help to dispel negative narratives about lawyers among the general public),³¹⁷ productivity and organizational slack (the idea that higher revenues and profitability are linked, causally, to higher pro bono hours insofar as keeping lawyers active when they have no fee-earning work may maintain productivity and boost revenues overall),³¹⁸ client development (the idea that not only do corporate clients increasingly demand law firms to engage in pro bono, but also that pro bono can be a good way for firm lawyers to collaborate with and network with corporate clients),³¹⁹ marketing (the idea that pro bono will bring recognition, awards and positive media attention to the firm vis-à-vis the general public but also potential future employees and clients),³²⁰ recruitment (as mentioned above, the belief that the best law students may select firms on the basis of pro bono opportunities),³²¹ retention (the idea that pro bono will help to keep lawyers happier and more content in their roles and thus contribute to increased work-

³¹⁷ Katzmman, *Law Firm and Public Good*, 174.

³¹⁸ Epstein, "Stricture and structure," 1692–94; Justus, "Using Business Strategies," 366; Cummings and Rhode, "Managing pro bono," 2409–19; Boutcher, "Private Law Firms," 555–58.

³¹⁹ Justus, "Using Business Strategies," 367; Boutcher, "Rethinking Culture," 124; Boutcher, "Private Law Firms," 549–58; Boon and Whyte, "Charity and Beating," 186, 187; de Sa e Silva, "Doing well and doing good," 16.

³²⁰ Epstein, "Stricture and structure," 1692–94; Justus, "Using Business Strategies," 369; Cummings, "Politics of pro bono," 125; Boutcher, "Private Law Firms," 544.

³²¹ Epstein, "Stricture and structure," 1692–94; Justus, "Using Business Strategies," 370; Cummings and Rhode, "Managing pro bono," 2386.

satisfaction and ultimately, employee retention)³²² professional development and training (the idea that pro bono can be used as a good way to provide junior lawyers with training opportunities and new professional experiences allowing for greater, autonomy and responsibility),³²³ and firm integration (the idea that pro bono can help to create a sense of firm culture by allowing lawyers in different practice groups and different offices to collaborate for a good cause).³²⁴ In what follows, I zoom out from law firm rationales to provide some broader ideological justifications that can cover the broader range of activities that I am defining under the term pro bono.

One rationale for pro bono historically has been religious duty, i.e. the sense that as (e.g.) a good Christian and as a lawyer, it is your duty to help the poor and the weak to secure access to justice or that there is an obligation on the Church itself to provide legal services to its congregation where they cannot afford to pay. Another possible rationale, perhaps the closest secular counterpart to religious duty, is a sense of charity. That is, a sense that one, due to one's social position, or due to the disadvantaged position of others, has an obligation, typically of a moral nature, to donate one's skills and expertise. Another rationale is a sense of professional duty or professional obligation. Lawyers, in belonging to a profession, have historically viewed pro bono as incumbent upon them, as lawyers, particularly before the emergence of state-sponsored legal aid in the mid 20th century. From this perspective, the legal profession as manifest in the local, regional or national Bar, is viewed as having a monopoly on legal expertise. Given that such expertise is crucial for the conducting of every-day social relations, lawyers have a duty to donate that expertise to those who would otherwise be unable to pay for it. Another rationale, prevalent in Ancient Greece, is a sense of civic duty, i.e. a sense that as a member of a (political) community, with the requisite skill-set, it is your honor and your duty to come to the service of your fellow citizens/ community members when they are in need of such service. Kinship ties and patronage may form yet further rationales. Pro bono by lawyers for members of their immediate and extended families is, of course, as old as the legal profession itself and will likely persist for as long as lawyers do. However, historically, with a more simplified legal profession and stronger family ties, kinship may have created more of a hard obligation to undertake pro bono work rather than the softer obligation that it likely forms

³²² Justus, "Using Business Strategies," 370–71; Cummings and Rhode, "Managing pro bono," 2386.

³²³ Epstein, "Stricture and structure," 1692–94; Justus, "Using Business Strategies," 371; Cummings and Rhode, "Managing pro bono," 2386.

³²⁴ Justus, "Using Business Strategies," 372.

today. Similarly, historically, particularly in Republican Rome, patrons also took it upon themselves to provide legal advice and representation (perhaps more akin to political protection) to those persons under their patronage.

Professional or social esteem, status or honor may also be a rationale for pro bono service provision. Linked to the ideas of professional duty or professional obligation and patronage, but separable, is the sense of honor, noblesse oblige or social esteem. At certain points in history and among certain lawyers there has pervaded the notion that to undertake pro bono work (particularly, but not exclusively, where this is for clients perceived as prestigious, such as leading global charities or international organizations) is an honorable duty that invests the relevant lawyer with professional status and signifies his/her belonging to an elite group of lawyers. Another rationale, common among trade unions, professionals' associations, women's groups, organized immigrant groups and other membership organizations is a sense of communal solidarity. Such groups take it upon themselves to identify/appoint lawyers (who are sometimes also members of the relevant group) who are responsible for providing legal services on a pro bono basis to any group member who finds themselves in need of lawyer.

A final rationale for the provision of pro bono services (in the way I have defined it here) is social contract theory. That is, the idea emerging from political philosophers such as Locke, Rousseau and Hobbes, that members of a political community, in giving up their natural rights to settle disputes by force, have contracted with the sovereign to provide for a peaceful alternative. To make that bargain meaningful, so the argument goes, the sovereign is under a duty to guarantee an equal chance to all (rich and poor) to pursue their rights in law. Implied in such guarantee, is the right to legal advice and representation in criminal and civil matters (i.e. the right to legal aid).³²⁵

Of course, as we shall explore in the next chapter, these rationales are not mutually exclusive and can and have been mixed and matched in different models of pro bono throughout European history.

³²⁵ For a detailed discussion of this argument, see Johnson, "Will Gideon's Trumpet," 201.

2.4 What is the objective of pro bono?

By “objective”, I mean to pose the question, ‘*to what end is pro bono work carried out*’? In the literature on pro bono, there has not been much discussion about the objectives of pro bono. This is likely a result of the fact that, as discussed, the assumed objective has been, virtually from the beginning of the modern pro bono movement in the 1970s, the promotion of access to justice (defined primarily in terms of civil legal aid). The literature does variously concede some other possible objectives, although these typically revolve around the various commercial incentives for carrying out pro bono work, such as professional gains (i.e. building esteem for the profession, as discussed in Chapter 1);³²⁶ legal training;³²⁷ business development³²⁸ and so on. In what follows, I briefly set out a list of possible objectives I would like to include within my definition, including those from the existing literature and others.

Of course, the first set of objectives comes directly from my three-part definition of access to justice set out above and equates to the what Cummings refers to as the “access” dimension of public interest law.³²⁹ On the narrow definition, as is extensively explored in the existing pro bono literature, pro bono may be oriented towards promoting formal and substantive access to the processes for administering justice (rulemaking, rule enforcement and conflict resolution) for persons who are subject to that justice. In terms of the types of work that might contribute to this end, while the provision of information, advice and legal representation directly to individuals (or non-profits, for that matter) with the aim of facilitating their access to the legal process would be the most obvious example, other examples would include any other type of pro bono legal work that has the primary objective of promoting formal and substantive access processes for administering justice, whether directly or indirectly (e.g. advocating for a law that would require the provision of legal advice to low-income individuals).

³²⁶ See, for example, Katzmann, *Law Firm and Public Good*; Spaulding, “Prophet and Bureaucrat,” 1398; Cummings, “Politics of pro bono,” 115; Dinovitzer and Garth, “Pro bono as elite strategy,” 115; Granfield, “Meaning of pro bono,” 115, 139; Rhode, “Lawyers’ Public Service,” 1441; and Sandefur, “Lawyers’ Pro Bono Service,” 79–112.

³²⁷ Epstein, “Structure and structure,” 1692–94; Justus, “Using Business Strategies,” 371; Cummings and Rhode, “Managing pro bono,” 2386.

³²⁸ Justus, “Using Business Strategies,” 367; Boutcher, “Rethinking Culture,” 124; Boutcher, “Private Law Firms,” 549–58; Boon and Whyte, “Charity and Beating,” 186, 187; de Sa e Silva, “Doing well and doing good,” 16.

³²⁹ Cummings, “Pursuit of Legal Rights,” 523.

In the wide definition, pro bono might be directed at ensuring that the administration of justice is fair, consistent, impartial, reasonable, i.e. at removing systemic or structural defects inherent in the norm (justice) for the sake of which the institutionalized rulemaking, rule enforcement and conflict resolution processes operate. This is what Cummings refers to as the “policy” dimension of public interest law.³³⁰ Such pro bono work would be less likely to consist of the provision of legal advice and information to individuals or case-by-case individual representation (as this is unlikely to result in norm change). Such pro bono work would likely be targeted at promoting significant law reform, constitutional change, achieving resource redistribution through the judicial process and effecting culture shift within the judicial institutions. Such outcomes might be pursued by way of lobbying and legal and policy advocacy undertaken collaboratively with non-profits (NGOs, civil society organizations etc.), through the provision of legal training to public officials (including judges, magistrates and prosecutors) e.g. to promote transparency and the rule of law or fact-finding and evidence gathering to establish systemic or structural bias in the administration of justice.

There are, however, other interesting objectives of pro bono worth noting. One might be conceived of as moral education. That is, providing an answer to the question “Why should I care about a stranger, a person who is no kin to me, a person whose habits I find disgusting?”³³¹ Pro bono has at times been used as a strategy for encouraging lawyers to step into the shoes of the working class, the poor and the marginalized and to learn to identify with them or, through working with certain non-profits, to learn to sympathize with and relate to certain causes such as LGBTI rights, the rights of ethnic minorities or the eradication of poverty in the developing world. Any legal work that brings lawyers into contact with different kinds of people and unfamiliar causes could serve the purpose of promoting better awareness of systemic bias or the responsibility of elites toward non-elites. Yet another objective as discussed in Chapter 1, that remains as relevant today as it was in the 19th century, is legal training. Pro bono is often used to provide junior lawyers with experience of working with clients and managing client relationships and case files. Younger lawyers would not be entrusted with such responsibilities in relation to clients paying fees at market rates and so pro bono work can be a training ground for them, where they have more freedom to make mistakes. Another important objective historically is professional gain. By professional gain, what is implied here is the respect and

³³⁰ Ibid.

³³¹ Rorty, “Human rights, rationality, and sentimentality,” 185.

esteem of one's peers, possibly also promotions or valued professional titles and positions. As we shall see in Chapter 3, pro bono has at times, notably in Republican Rome, been deployed as a means to an end, investing lawyers with honor and winning them respect. One further important objective worth mentioning is the use of pro bono as a business development tool. This is particularly relevant in the Big Law model of pro bono where commercial clients have been known to include a firms' pro bono commitment as one factor, among others, affecting their decisions about which firms to appoint. Although, note that where discounted services are offered to clients solely in the hope of winning future business, this would not qualify as pro bono in the way it has been defined here, as it would not pass the "public good" test set out above.

2.5 What is "Big Law Pro Bono"?

A final definition, crucial for this thesis, is a definition of Big Law Pro Bono. The focus of this thesis and much of the pro bono literature to-date has been on pro bono as practiced by large commercial law firms. As set out in Chapter 1, Big Law Pro Bono traces its origins to the United States and to progressive legal movements of the 1960s and 1970s. During this period, the largest and most elite of US law firms (certainly the top 20 or so) felt that in order to recruit the most elite of law students, they needed to develop public service programs.³³² Subsequently, between the 1980s and the 2000s, the largest of US law firms (N.B. by 2001 the top 50 US law firms had an average of over 621 lawyers)³³³ were institutionalizing pro bono programs throughout their offices (and these programs began to span the globe from 1980 onwards).³³⁴ As we shall see in Chapter 4, it is primarily as a consequence of this process that Big Law Pro Bono came to exist in Europe at all. The implication is that, when we are talking about "Big Law Pro Bono" in Europe, we are (for the most part) necessarily talking about firms with at least 500 lawyers and typically a great deal more. Therefore, in this thesis, where I speak of "Big Law Pro Bono", I am referring to those firms with more than 500 lawyers (exclusive of Partners). That would be, approximately, the largest 100 law firms in the US, the largest 30 law firms in the UK and the top three or so law firms in Spain, the Netherlands,

³³² Handler, Hollingsworth, and Erlanger, *Pursuit of Legal Rights*, 123; Cummings, "Politics of pro bono," 35.

³³³ Cummings, "Politics of pro bono," 35; Galanter, "Mega-law and mega-lawyering," 152–76.

³³⁴ Faulconbridge et al., "Global Law Firms," 459; see also Beverstock et al., "Long arm of the law"; and Bauman, *Pioneering a Global Vision*.

France, Germany and Italy. Big Law Pro Bono thus refers to the structured and institutionalized pro bono practices established by these firms to engage their lawyers in pro bono work, as this has been defined above i.e.:

Legal work undertaken for the public good, at below market rates, for recipients who:

- a) cannot afford to pay;*
- b) due to the scarcity of financial resources or the limited value placed on the relevant legal services relative to other goods and services, would not pay; or*
- c) would otherwise not be able to source such services elsewhere on the open market.*

3 Methodological Approach

The final objective of this chapter is to set out my methodological approach in undertaking the research for this thesis. The research initially started out with a much broader focus - on public interest lawyering in Europe in general. Over a period of time, I gradually narrowed the focus, although after having first done significant research in relation to the broader research topic. There were several reasons for this. Firstly, as I began to dig into my original research topic, the scale of the undertaking became increasingly apparent. It dawned on me that it would take significantly more time than I had at my disposal to cover all the aspects of public interest lawyering in Europe that I had set out to cover (including legal aid, pro bono, clinical legal education and civil society legal advocacy). Secondly, as time went on, I became especially interested in two of these topics, clinical legal education and pro bono. This was primarily for professional, career development reasons. I knew, from well before commencing my PhD, that I wanted to pursue a career outside of academia (or alongside academia) and clinical legal education and pro bono presented interesting and suitable career paths for me given my CV at that point in time (having spent much time engaged in policy oriented academic legal research and having qualified as a lawyer with a large commercial law firm in London). As happenstance would have it, I secured a job as a clinic teacher at NYU Paris in 2015 and so my interest in clinical legal education deepened. Through that opportunity I became involved in a project to create an edited volume on clinical legal education.³³⁵ This edited volume ultimately

³³⁵ Alemanno and Khadar, *Reinventing Legal Education*.

became the primary outlet for the research that I had carried out on clinical legal education up until that point. Thereafter, as I became more knowledgeable about the field of pro bono and having secured a job working as a full-time pro bono lawyer, I decided to focus my thesis exclusively on pro bono, as a topic deserving of more in-depth investigation within the broader area of public interest lawyering.

In line with best practice, once I had settled upon my research topic and research question (essentially to empirically explore public interest lawyering in Europe), I needed to identify the most appropriate research methodologies for my purposes.³³⁶ Given that the project was largely exploratory, I knew that my first step would involve desk-based research. Moreover, given that it related to organizational practices and the experiences of individual actors (lawyers, advocates, activists, etc.) I knew that interviews would be a necessity. However, as is natural in the inductive nature of qualitative research, my methodology unfolded over time as I found out more and became more engaged in my field of study.³³⁷ For example, the participant observation opportunities and archival research only emerged organically many months into the research process.

Overall, the study has combined qualitative, quantitative, historical and anthropological research elements. These will be explored below under several thematic headings.

3.1 Timeline and geography

The research was carried out between 2014 and 2016:

Date	Location	Research activity
January to December 2014	EUI, Florence, Italy	Desk-based research
November 2014	PILnet European Pro Bono Forum, London, UK	Participant observation

³³⁶ Webley, “Qualitative approaches,” 931.

³³⁷ Ibid.

January to July 2015	EUI, Florence, Italy	Desk-based research
August to October 2015	PILnet, New York, USA	Participant observation, interviews and archival research
August to October 2015	Ford Foundation Archives, New York, USA	Archival research
November to December 2015	UCLA, Los Angeles, USA	Skype interviews and desk-based research
January to August 2016	EUI, Florence, Italy	Skype interviews and surveys
May 2016	DLA Piper, London, UK	Participant observation and interviews
July 2016	Open Society Archives, Budapest, Hungary	Archival research and interviews

3.2 Desk-based research

When I first started my research, having no contacts in my field of study, I knew that an initial mapping exercise conducted through desk-based research was going to be crucial. Indeed, it was one particular article I found ("Constructing public interest law: Transnational collaboration and exchange in Central and Eastern Europe") written by Ed Rekosh (Founder and Director of PILnet) in 2008, that actually opened the door on my research field, and allowed me, for the first time, to perceive my research terrain.³³⁸ It was thanks to this discovery that I decided to attend the PILnet annual Pro Bono Forum in 2014, which then opened many doors in terms of my research process. After discovering this article I engaged in further desk-based research including checking whatever historical documents about PILnet and pro bono in Europe I could find online, and reading law firm and clearinghouse websites.

³³⁸ Rekosh, "Constructing public interest law," 55.

3.3 Interviews

My interviews did not start in earnest until I was well into my participant observation stint at PILnet's global headquarters in New York. Once there, I began to embrace a snowball sampling technique, whereby I would begin with low priority interview subjects and ask them who they thought were the key persons I should talk to in order to get real insight into the Big Law Pro Bono in Europe. (I did this with each person I interviewed until my list of targets built up.)³³⁹ PILnet staff were then incredibly helpful in terms of connecting me via email to the relevant individuals. Ultimately, I carried out 56 interviews with pro bono managers and NGO and clearinghouse employees.

Another methodological issue that I prepared for was interviewing elites. Most of my interview subjects were, broadly speaking, legal elites. This insofar as they were largely educated at elite law schools, had qualified as lawyers and practiced at elite firms or leading NGOs. Some of them had had distinguished careers and they were all significantly older than I was. They were the kind of people who placed a premium on professionalism and precision in their communication, and they were the kind of people who were incredibly busy and would not be able to spare much time. Accordingly, significant advance planning was necessary.

In line with the literature on interviewing elites, I did a great deal of biographical research in advance of my interviews and began my interviews by asking biographic questions and about their involvement in major achievements in the field. This was intended to build rapport, establish my credentials as someone knowledgeable of the terrain and to get my subjects into a reflective mood.³⁴⁰ My advance preparation and use of a similar thematic structure throughout each interview allowed me to make efficient use of time. Aware that building trust with elites is hard and invaluable, I would also capitalize on the trust I built up with each interview subject to gain access to further individuals in their network (i.e. snowball sampling).³⁴¹ I found that, with each passing interview, I became more knowledgeable in the subject matter, was able to build rapport faster, was able to ask better questions, and was able to solicit better quality answers.

³³⁹ King and Horrocks, *Interviews in Qualitative Research*, 34.

³⁴⁰ Mikecz, "Interviewing elites," 491.

³⁴¹ Ibid.

3.4 Surveys

I carried out two surveys, both in partnership with non-profit organizations. The surveys focused on two of the major actors within the pro bono field; pro bono managers at law firms and NGOs (clearinghouses, being the third key actor, were covered via several in-depth interviews). Although the surveys were carried out with other organizations, they were both designed and led by myself with support from volunteers. The idea behind using survey data was as follows:

1. With respect to NGOs: to reach out to a large population of actors indirectly relevant to my research who I did not have time to carry out mass interviews with in order to establish some broader trends for the population group. Also, due to the anonymous nature, I hoped to find out information that might be revealed during an in-person interview.³⁴²
2. With respect to pro bono managers, again, I hoped to identify some trends which I had suspected, based on prior exploratory interviews, and which could then be followed up on again through further in-depth interviews (effectively carrying out a “quant switch”).³⁴³

3.4.1 NGO survey

The objective of the NGO survey was to identify how EU-oriented NGOs based in Brussels were making use of pro bono legal services. The survey was targeted at Brussels-based NGOs as it was assumed that: a) these would be the most sophisticated NGOs in the use of legal strategies and so the most familiar with pro bono legal services; b) given that Brussels is home to EU institutions and several Pan-European (umbrella) civil society organizations, it would provide a good cross-section of types of organizations (in terms of substantive causes); and c) Brussels has one of the highest concentrations of international law firms, and it was believed that such firms would be engaged in the provision of pro bono legal services. The limitations

³⁴² Becker and Geer, “Participant observation and interviewing,” 30.

³⁴³ Webley, “Qualitative approaches,” 932.

of the survey are, of course, that Brussels is a very unique political, legal and advocacy context and so the results cannot be generalized across the whole of Europe.

The survey was designed by myself both in my capacity as a PhD researcher and in my capacity as co-founder of The Good Lobby, a skill-sharing platform connecting academics and lawyers to non-profit organizations in need of advocacy advice. It was carried out in cooperation with PILnet (the Global Network for Public Interest Law), the European Foundation Centre, the Cyrus R. Vance Center, international law firm, DLA Piper, and the International Associations Centre. This survey was written and prepared by myself and carried out with the support of a broader team of The Good Lobby staff and volunteers including Alberto Alemanno (Co-Founder and Director of The Good Lobby) and Erik Uszkiewicz, Leire Larracoechea San Sebastian, Zane Rasnaca, Alvaro Oleart, Idil Kart, Benjamin Bodson, Athziri Gonzalez, Pauline Weller, Virginia Passalacqua.

On the basis of the EU Transparency Register listings, I calculated that the total population of NGOs with an office in Brussels whose primary interests were listed as either at the "European" or "Global" level (i.e. excluding organizations focused purely on national Belgian affairs) was approximately 600. Of those 600, working with a team of volunteers from The Good Lobby, we emailed 416 NGOs, and 100 of them completed the survey. That is a response rate of just under 25%.

The survey of 100 NGOs is representative of the entire given population of 600 with a margin of error of +/- 9% at a confidence level of 95%. This implies, for example, that if 54% of the 100 surveyed NGOs say they have made use of pro bono before, then I can say with 95% confidence that somewhere between 45% and 66% of the 600 total population of NGOs will have made use of pro bono before.

3.4.2 Pro bono manager survey

Based on discussion with PILnet staff, I calculated that there were approximately 50 full-time pro bono managers globally with a mandate for Europe. Of those, only approximately 30 were actually likely to be based in Europe and just a handful of those would be based in Continental Europe. It was therefore hard to determine what the relevant population was. Nevertheless, with support from PILnet staff, the survey was circulated among 30 full-time pro bono

managers within PILnet's network, of which, 21 completed the survey. Assuming a population size of 50, and my sample size of 21, the survey has a margin of error of +/- 16% at a confidence level of 95%. This means that if 80% of the pro bono managers I surveyed say they do not do any pro bono work directly for low income individuals in Europe, then I can conclude, with 95% confidence, that somewhere between 64% (i.e. 32 firms) and 96% (i.e. 48 firms) of the total population (i.e. 50 firms) do not do any pro bono work directly for low income individuals in Europe.

3.5 Archival research

It has been said that, "the intuitional fabric of modern societies captures traces of individuals, organizations and social movements in a variety of complex ways, including physical traces collected in cultural monuments such as libraries, museums and formal archives".³⁴⁴ From this vantage point, archives can be immensely valuable in historical research insofar as they act as a collective human memory, recalling fact pattern that no one person could independently piece together. Particularly in the study of public interest law, where foundations play such an important role through the disbursement of grants and (arguably) setting an agenda for civil society, archives can help the researcher to "follow the money" and get behind individual decisions that would not make sense without financial and economic context. It has further been said that:

"Documents, as the sedimentations of social practices, have the potential to inform and structure the decisions which people make on a daily and longer-term basis; they also constitute particular readings of social events. **They tell us about the aspirations and intentions of the period to which they refer and describe places and social relationships at a time when we may not have been born**, or were simply not present."³⁴⁵ (emphasis added)

In this manner, I found archival research incredibly useful in terms tracking and mapping key players and understanding the real motivations (at the time) behind certain policies and funding programs.

³⁴⁴ Hill, *Archival Strategies and Techniques*, vol. 31, 3.

³⁴⁵ Webley, "Qualitative approaches," 936.

However, archival research is notoriously time-consuming, often described along the lines of ‘looking for a needle in a haystack’.³⁴⁶ Archives – and the Ford Foundation and Open Society archives are no exception – contain thousands of documents, and key documents (for the purposes of a given research project) can be buried away in obscurely named files that are not at all intuitive to browse. Accordingly, the best practice is to plan well in advance and develop a strategy for approaching archival research.³⁴⁷ To this end, I browsed the websites of both archives in advance of my trips and liaised with the archive staff to prepare key grant files for my arrival. My strategy did not involve any thorough review of the files and documents on-site in the archive. Rather, I simply identified the files that were useful for my purposes and photographed the relevant pages on my iPhone (as permitted by the archives).

Unfortunately, the Open Society Archives did not turn up much useful information as they were not very well structured. However, the Ford Foundation archives were immensely useful. I was able to carefully piece together a collaborative funding initiative amongst several funding organizations, aimed at developing a public interest law field in Europe. I was able to track down the monies expended, the organizations and individuals involved and the thinking behind the strategy and reasons for the eventual termination of the funding program.

3.6 Participant observation

Participant observation can be defined as a research method “*in which the observer participates in the daily life of the people under study, either openly in the role of researcher or covertly in some disguised role, observing things that happen, listening to what is said, and questioning people, over some length of time*”.³⁴⁸ As noted above, the possibilities to engage in three stints of participant observation all emerged rather organically. However, these opportunities ultimately were invaluable, both in terms of gaining access to interview subjects and in simply observing the practice of Big Law Pro Bono both from the law firm (DLA Piper) and clearinghouse (PILnet) perspective. It has been said, that:

³⁴⁶ Gallo, “Doing Archival Research,” 262.

³⁴⁷ Ibid., 262, 263.

³⁴⁸ Becker and Geer, “Participant observation and interviewing,” 28.

“[P]articipant observation provides a situation in which the meanings of words can be learned with great precision through study of their use in context, exploration through continuous interviewing of their implications and nuances, and the use of them oneself under the scrutiny of capable speakers of the language.”³⁴⁹

Participant observation afforded me with the opportunity to learn the “language” of Big Law Pro Bono and to detect the subtleties of this language, underlying frustrations, tensions and the power dynamics at play between various actors. It also provided me with the opportunity to engage directly in both pro bono matchmaking (at PILnet) and pro bono management (at DLA Piper). This experience was invaluable in terms of helping me to get to grips with the various stakeholders involved, their roles and the reality of their daily relationships.

3.6.1 PILnet European Pro Bono Forum 2014

My first direct exposure to the real life world of pro bono was my attendance at the European Pro Bono Forum in London in November 2014. As will be explored in the thesis, the Forum is the central event in the European pro bono calendar. It is an event when all relevant stakeholders get together (pro bono managers, lawyers who do pro bono work, non-profits, and clearinghouses from across Europe) to discuss the recent developments, the latest success stories, and primarily to network with one another. It was an eye-opening experience for me and gave me an overview of all the relevant actors and who I needed to know in order to pursue my interview strategy. Although I did not have much opportunity to talk to the key actors at the Forum, attending the working groups and panel sessions provided great insight into the “hot topics” within the European pro bono landscape.

3.6.2 PILnet Global Headquarters, New York

On the basis of contacts I had made at the forum and follow-up contact with those individuals (mainly Atanas Politov and Ed Rekosh), I managed to arrange a three month stay with PILnet during my Fulbright exchange period in New York, although the experience was not ideal as Ed Rekosh had just stepped down as CEO of PILnet and so the whole organization was very much in transition. However, ultimately, this situation played into my hands insofar as I found

³⁴⁹ Ibid., 29.

employees were very willing to talk to me openly about the organization, its successes and failures, and what the future might hold. I was also granted unrestricted and unsupervised access to the PILnet archives (a filing room) which turned up incredibly rich primary sources (historical emails, grant files, reports, draft documents) that allowed me to closely reconstruct the activities of PILnet during key periods relevant to my research. In addition, the opportunity to get involved in preparing PILnet's annual pro bono report for 2013 provided me with access to their databases, based on which, with their permission, I was able to explore their historical matchmaking data across Europe.

3.6.3 DLA Piper Pro Bono Team, London

My two-week research internship with DLA Piper in London, although brief, was also very useful. Had I only spent time with PILnet, my perspective on pro bono in Europe would have been significantly skewed. My time at DLA Piper, the interviews I undertook there, and the data I was able to secure (e.g. internal pro bono reports) provided me with insight into how law firms manage pro bono practices in Europe, which can be very different from how clearinghouse employees perceive it. It was during this internship that I began to understand more fully the power dynamics between law firms and clearinghouses and their NGO clients and problems that arise in these relationships. It also provided me with unrestricted access to DLA employees for the purpose of interviews. I found that talking to pro bono managers of different age ranges, levels of responsibility and degrees of experience (within the DLA team) was particularly helpful insofar as they each provided unique perspectives.

3.7 Qualifications

There are several important qualifications I must make which may or may not have bearing on my research outcomes:

1. On the basis of my research internship at DLA Piper, I was ultimately offered a job with this firm as a Pro Bono Associate for Continental Europe, which I accepted and took up from September 2016.

2. The research gathered throughout my research process also went to several other uses:
 - a. A report on the history of Pro Bono in Europe prepared for PILnet.³⁵⁰
 - b. An NGO legal needs survey prepared for The Good Lobby (a clearinghouse active in Europe that I co-founded).³⁵¹
 - c. A collaborative book chapter authored together with Ed Rekosh for an edited volume on Global Pro Bono.³⁵²
 - d. An edited volume on clinical legal education in Europe co-edited with Professor Alberto Alemanno.³⁵³

I am of the opinion that my involvement in these other projects greatly enhanced my research outcomes insofar as it built my reputation within the European pro bono community, increased my legitimacy, opened many doors for me in terms of access to interview subjects and boosted my capacity to undertake otherwise time-consuming quantitative research. However, I acknowledge that these projects represent significant opportunities for personal development and could be said to have compromised my objectivity. To mitigate the risks of compromised objectivity, I have done as follows: I have carried out all interviews on the basis of anonymity (i.e. the identities of the interview subjects will not be revealed in this thesis unless I have explicit approval for this) and I have tried to adopt a critical approach in my research by proactively seeking out the most critical perspectives on Big Law Pro Bono that I could find and challenging interview subjects to respond to these criticisms.

4 Conclusion

In this chapter, I have sought to develop a definition of access to justice that serves a handful of different purposes. Firstly, it incorporates and moves beyond the narrow definition of access to justice typically employed in the pro bono literature which revolves around increasing the availability of civil legal aid. Secondly, it responds to criticisms of such narrow conceptions of access to justice by including both procedural and substantive elements. Thirdly, it provides an evaluative framework for Big Law Pro Bono in Europe and will facilitate an assessment of the

³⁵⁰ Khadar, *Growth of Pro Bono*.

³⁵¹ Khadar et al., *Good Lobby Legal Needs Survey*.

³⁵² Forthcoming.

³⁵³ Alemanno and Khadar, *Reinventing Legal Education*.

extent to which this practice contributes to access to justice. Fourthly, it provides an expanded normative project for Big Law Pro Bono in Europe. The three-part definition should enable to us both to: i) explore the ways in which models of progressive lawyering throughout European history have contributed to access to justice (Chapter 3); and (ii) interrogate the extent to which Big Law Pro Bono contributes to access to justice in Europe today (Chapter 6).

We have also sought to provide a loose and broad definition of pro bono in general, based upon the existing literature. On that basis, I have also defined Big Law Pro Bono. Finally, I have charted the methodological approach taken to the research in this thesis and set out a few important qualifications.

In the following chapter, I will explore the historical background context of pro bono lawyering in Europe. This will be done by way of discussing various models of pro bono lawyering (as I have defined it here) that have variously been embraced throughout European history. These models will be evaluated in terms of their respective approaches towards access to justice. However, the objective will be to identify the historical, social and legal background context against which Big Law Pro Bono, as an ideologically indeterminate and historically and politically contingent resource, has taken shape.

CHAPTER 3 – Precursors to Big Law Pro Bono: A History of Pro Bono and Social Change

Lawyering in Europe

In the previous chapters, we have explored the existing literature on pro bono and set out the analytical and methodological parameters of the thesis. In this chapter, there are three core objectives. The overarching objective is to provide historical context to pro bono lawyering and social justice lawyering more broadly in Europe. In the first chapter, I suggested that social institutions emerge from specific historical, economic and political background contexts, which may influence the shape that such institutions take. I further suggested that Big Law Pro Bono, certainly in the early stages of institutionalization, could be understood as a resource and as such, could be described as ideologically indeterminate. We further explored how Big Law Pro Bono, conceived of as a social institution, emerged from a particular historical and political background context in the United States and I suggested that Big Law Pro Bono, as a social institution, could be described as historically and politically contingent. I further noted that pro bono in general and Big Law Pro Bono in particular, in the United States, has come to be viewed functionally as a solution to the (civil) access to justice gap and suggested that this conception of pro bono has also been largely embraced normatively and empirically in the literature on pro bono. In this chapter, we will begin to explore the historical context into which (as will be explored further in Chapters 4 and 5) Big Law Pro Bono has been transplanted in Europe.

The second and third objectives are secondary to and flow from the overarching objective described above. Firstly, we will explore how pro bono has been practiced in Europe throughout history (Section 1). This discussion will help to contextualize the development of Big Law Pro Bono in Europe and may help us better understand, in subsequent chapters, why the institutionalization of Big Law Pro Bono in Europe took the course that it did. Furthermore, by referring to the definitions of access to justice and pro bono developed in Chapter 2, we will be able to evaluate how pro bono has contributed to access to justice over the years, which may provide a useful comparative reference point for the discussion on Big Law Pro Bono in Europe in the remainder of the thesis.

Secondly, we will explore three contemporary progressive legal advocacy movements in Europe (Section 2), i.e. the civil liberties and human rights movements and the public interest law movement. In Chapters 1 and 2 we noted how important the poverty law movement and public interest law movement, in the United States, were in informing the manner in which pro bono (and specifically Big Law Pro Bono) was defined and institutionalized in the United States. The hypothesis is that similar progressive movements in Europe may have influenced the development of Big Law Pro Bono in Europe. However, the purpose in this chapter is not to make that argument, but simply to provide an understanding of these movements, which will then be explored in relation to the institutionalization of Big Law Pro Bono in Europe in the subsequent chapters. It is worth quickly recapping the core hypothesis of the thesis here, i.e. even though Big Law Pro Bono has come to exist in Europe primarily due to the globalization of US law firms, a unique variant of Big Law Pro Bono has emerged in Europe, not focused on individual legal assistance to low-income clients, akin to the model that has been institutionalized in the United States. Rather, the model of Big Law Pro Bono that has come to dominate in Europe is oriented primarily towards providing technical, research and policy assistance to transnational human rights and European policy non-governmental organizations (NGOs). In the final part of this chapter, I will begin to provide the necessary context to understand why this might be the case.

One of the most important claims of this Chapter and explored further in Chapter 5, relates to the emergence of the “Social Bar” in Europe i.e. a subgroup of lawyers who specialize in legal aid cases. The thesis will explore how the emergence of the Social Bar, to some extent, led to functional separation within European legal professions in relation to the provision legal services to the poor by creating a remunerated class of specialist legal aid lawyers and displacing the duty, on the profession as a whole, to provide pro bono services to the poor.

Before we proceed, we should clarify a few final points about the parameters of the historical review in this chapter. Firstly, this review will conclude around the year 2000, which is the period just prior to the emergence of Big Law Pro Bono (in any significantly coordinated manner) in Europe. Secondly, in this review, by “Europe”, what is meant is the territory of the contemporary Council of Europe Member States. Ultimately, the review aims to provide an overview of various types of pro bono lawyering and legal advocacy across Northern, Southern, Western and Eastern Europe. However, it will only provide a flavor, as this is

ultimately a pan-European research project and so no particular country will take priority or be explored in any real detail. Thirdly, the information presented in Section 1 below is based largely on a review of several important secondary sources, including, for example: the 1927 international study conducted by the League of Nations into legal aid for the poor;³⁵⁴ the large 1970s comparative study of access to justice led by Mauro Cappelletti at the University of Florence;³⁵⁵ and a series of studies carried out in the early 2000s by the Public Interest Law Initiative, the Bulgarian Helsinki Committee, the Polish Helsinki Foundation for Human Rights and INTERIGHTS, exploring access to justice in Central and Eastern Europe.³⁵⁶ Meanwhile, the information presented in Section 2 is based on a mixture of primary sources (archival research and interviews) and secondary sources (from desk-based research). Therefore, much of the information presented in Section 2 is novel research.

1 A History of Pro Bono Lawyering in Europe

Below, pro bono practice (as defined in Chapter 2) will be explored, throughout Europe, along both historical and thematic axes. The main structure will be provided by a historic analysis moving from Ancient Athens through to the late 20th Century. The most recent developments in relation to pro bono (and state-funded legal aid) will be discussed in Chapters 4 and 5. The discussion below will also proceed thematically by reference to the various more or less organized ways (models) of structuring pro bono that have been adopted throughout European history. From ad hoc individualized pro bono to systems of organized volunteers and more institutionalized models subsidized by the Church or the State. As there are some commonalities between certain models, across time periods, and certain models can be found throughout European history, the historical structure will not be strictly adhered to. Ultimately, it is hoped that this will help us to understand what is really novel about Big Law Pro Bono in subsequent chapters and to what extent we can see similarities or divergences between these historical models of pro bono and the contemporary practice of Big Law Pro Bono in Europe.

³⁵⁴ League of Nations, *Legal Aid for the Poor*, V. Legal 1927.

³⁵⁵ Cappelletti, *Florence Access to Justice Project* (Sijthof Giuffrè, 1978).

³⁵⁶ Public Interest Law Initiative et al., *Access to Justice*.

1.1 Ancient Athens and Republican Rome

Throughout this early period of European history, various models of pro bono persisted, from ad hoc, individualized pro bono assistance, to semi-organized models of assistance rooted, for example, in notions of communal solidarity. The clients were typically individuals of limited political influence and financial means and were not generally charged for such legal services. Invariably, the assistance provided would involve representation before judicial and political fora while the rationales varied: from a sense of civic duty, kinship ties, aristocratic honor, patronage to professional esteem. There is little evidence of lawyers engaging in pro bono as a way of pursuing any particular cause or political agenda. Rather, pro bono provision during this period appears to have been largely duty-bound and sometimes even self-serving. Nevertheless, as legal systems became more complex and with the monetization of legal services, we can find evidence of growing concerns, within legal and political discourse, about access to justice, defined narrowly, as the access of the poor and politically weak to the conflict resolution process. What becomes apparent from the discussion below is how the political and social background context plays a decisive role in shaping pro bono as a resource, both by creating a demand for that resource, but also by determining its conditions of possibility (e.g. vis-à-vis the shape of the legal profession) and its rationale and normative orientation (e.g. as a consequence of prevailing power dynamics and political realities).

1.1.1 Ancient Athens

Of course, there will be no need for individuals to retain the skills of a lawyer where there is no settled legal system (an established jurisdiction and body of rules and a normalized procedure). As such, the need for professional lawyers does not arise in ancient Athens until after 600 BC and the emergence of the heliastic courts.³⁵⁷ In these courts, litigants were required to face large popular juries and success depended on “carefully prepared and expertly delivered argument”.³⁵⁸ As such, the practice of retaining professional assistance in the presentation of cases began to replace the prior practice of self-representation. Often these services were provided by the *synegoros* or *hyperapologoumenos*, persons employed to speak in court or write speeches on behalf of a litigant or defendant. In earlier times, these were

³⁵⁷ Chroust, “Ancient Athens,” 344.

³⁵⁸ Ibid.

primarily friends, relatives or patrons of the litigant or defendant but in due course, they became professional “lawyers”.³⁵⁹

This professionalization of legal representation brought with it the commodification of such services (the practice of paying these professionals for services rendered). However, sometime around the year 403 BC a law was passed forbidding the paying of professional lawyers in private suits. (NB “private” in this context does not correspond to contemporary civil suits but rather implies any suit where a private matter was at stake. For example, homicide was considered a private matter for relatives to litigate.)³⁶⁰ It is believed that retaining professional lawyers came to be considered an undemocratic practice at this time. This law was likely, in no small part, a response to lawyers playing a central role in revolutions overthrowing Athenian democracy (in 411/10 BC and 404 BC), resulting in one case in a short-lived oligarchic state.³⁶¹

Beyond this, a prominent justification for the belief that paying for legal services was undemocratic was the idea that allowing lawyers to be paid would benefit the rich at the expense of the poor. The poor, it was felt, would be unable to afford the most talented and thus most expensive advocates.³⁶² Another important justification was the idea that Athenian democracy should be rooted in mutual solidarity and compassion between citizens and, as such, legal advocacy should be an act of civic duty rather than a means to make a profit.³⁶³ For example, Philosopher Anaximenes, speaking of the provision of legal representation, suggested that “in a true democracy every one helps another to the best of his abilities [and] there was really no difference between giving a man legal advice and teaching or instructing him”.³⁶⁴ Meanwhile, famous lawyer, Hyperides questioned:

“What is more democratic than that those who are able to plead a cause should come to the aid of those who are themselves unable to do so, particularly if the latter are in dire peril?”³⁶⁵

³⁵⁹ Ibid., 353.

³⁶⁰ Osborne, “Law in action,” 40.

³⁶¹ Chroust, “Ancient Athens,” 353.

³⁶² Ibid.

³⁶³ Ibid.

³⁶⁴ Ibid., 359.

³⁶⁵ Ibid., 372.

This idea is further evidenced by the fact that Athenian lawmaker, Solon, enacted legislation that enabled any man who had the means, to pursue a public claim in the name of the city on behalf of any other man who had been harmed or wronged. The idea was to sensitize citizens to the suffering of one another and so increase their sympathies for the citizenry as a whole.³⁶⁶ However, there is little evidence of citizens actually making use of this legislation, which perhaps resulted from the fact that any would-be third party prosecutor would be required to pay a fine and face possible disenfranchisement if he failed to win one fifth of the jury's votes or decided to drop the suit.³⁶⁷

Moreover, due to the difficulties inherent in enforcing the prohibition on payment of legal fees, this law was apparently often simply ignored. Nevertheless, there were still those lawyers who would provide representation for free to their relatives, friends and associates out of a sense of civic or personal duty. In this vein, some Athenian townships and clubs (e.g. fraternities) would provide legal aid to their inhabitants and members where they had come into legal troubles and were otherwise unable to afford legal representation.³⁶⁸ This system, which was apparently reasonably common, enabled weaker defendants to obtain assistance, typically from elected officials acting on their behalf as *synegoros* and presenting their case in court.³⁶⁹ However, it has also been argued that it is questionable whether this township or club-based legal aid practice was extended to ordinary citizens, unconnected in any way to those with influence.³⁷⁰

Beyond this, there were also "state-attorneys", lawyers employed by the City for very low pay, in order to protect the public interest, typically by carrying out important public prosecutions. This was considered an honorable and civic duty, which sometimes led to important political careers.³⁷¹ To the contrary, before the middle of the fourth century BC, and in line with the prohibition of payment of legal fees, private lawyers acting for those beyond their inner circle were typically viewed with suspicion and sometimes even outright derision.³⁷²

Pro bono in Ancient Athens then, emerges as a resource, against the backdrop of the monetization of legal services and broad concerns with communal solidarity and civic

³⁶⁶ Osborne, "Law in action," 41.

³⁶⁷ Christ, "Helping Behavior," 282.

³⁶⁸ Chroust, "Ancient Athens," 352; Rubinstein, *Litigation and Cooperation*, 230–31.

³⁶⁹ Rubinstein, *Litigation and Cooperation*, 230–31.

³⁷⁰ Christ, "Helping Behavior," 284.

³⁷¹ Chroust, "Ancient Athens," 361.

³⁷² *Ibid.*, 369–61.

responsibility. The evidence suggests that only semi-organized models of pro bono emerged (e.g. as practiced by townships and clubs). Of course, given that the legal system itself was not very complex during this period, it is perhaps unsurprising that pro bono practice at the time reflects this simplicity. What is interesting during this period is the emergence of concerns, reflected in political and legal discourse, with access to justice, as defined narrowly in Chapter 2. For example, the distinguished professional lawyer, Demosthenes, complained that, “in Athens the poor man was at a disadvantage due to his financial inability to retain the services of a competent lawyer”.³⁷³ Similarly, Plato was concerned that “justice was at the service of whomsoever was able and willing to pay for the services of a professional lawyer”.³⁷⁴ Laws forbidding payment for legal services also arguably (at least partially) reflect such concerns.

1.1.2 Republican Rome

Unlike in Ancient Athens, in the Ancient Roman Republic and early Roman Empire, a legal profession was allowed to flourish, becoming sophisticated and well established in the socio-political order. The legal profession in Ancient Athens had been considered anti-democratic and so was never permitted to develop into an authoritative and powerful professional body. Not so in the Roman Republic, where the legal profession was revered. This different social status given to the legal profession is reflected in how the pro bono resource took shape.

The Roman legal profession emerged from the body of “state priests”, *sacerdotes publici*. These were men of noble origin, patricians, occupying important social or political positions responsible for the interpretation of sacral and secular law.³⁷⁵ These men had in common a public-spiritedness stemming from their aristocratic social position and worldview. In these early periods, the profession was defined above all by a sense of honor and a commitment to public service and the cultivation of the highest standards of personal character. Their motto, *melius est virtute ius*, meant “high above all human virtues stands the law.”³⁷⁶

Even in later periods, as the Roman profession transcended its priestly roots and the practice of law began to be secularized, the profession was still stocked by aristocratic men

³⁷³ Ibid., 355.

³⁷⁴ Ibid.

³⁷⁵ Ibid., 100–01.

³⁷⁶ Ibid., 107.

(*patronus*).³⁷⁷ Patricians would take it upon themselves to provide protection (extending to legal services such as protection in court) to those within their household and to those who, occupying a position of dependency, were accordingly attached to the household of the patrician.³⁷⁸ These were the “clients” of the patrician and the arrangement is referred to as the *clientele* system.³⁷⁹ Subsequently, the protection afforded by the patrician became professionalized and these aristocratic men, by this point referred to as *patronus causarum*, would also offer legal protection to those unconnected to them.³⁸⁰

Crucially, owing to their social position, these aristocratic Roman lawyers whether state priests, *patronus* or *patronus causarum*, would not typically take payment for services rendered. This was consequent upon the fact that it would have been considered below these noble men of independent means to take payment and because it was believed that taking payment would degrade the practice of law and reduce it to a “mercenary business”.³⁸¹ As such, legal services were provided in this manner out of a sense of public duty, chivalry, honor and *noblesse oblige*, from the strong to the weak, from the patron to his family, to his vassals and to his neighbors, and even to strangers in need of help.³⁸²

However, with the increasing professionalization of legal practice, the *clientele* system evolved alongside the legal system and brought about specialization, novel legal roles and the intensification of legal practice. All of this would lead to the commodification of legal services and ultimately to a decline in the provision of gratuitous services to the poor and needy.³⁸³

With the passing of time the legal profession, once purely an occupation of noblemen and aristocrats, began to be embraced by men who were not of noble birth, men who could not afford to work for no remuneration.³⁸⁴ Moreover, as legal practice became more complex, fostered in part by the growing socio-political and economic complexity of Roman life, the job of the lawyer was intensified, requiring more time, more training and specialization.³⁸⁵ In turn, this led firstly to the expectation that lawyers would receive some form of remuneration

³⁷⁷ Ibid., 105–06.

³⁷⁸ Pound, *Jurisprudence*, 696, 697; Chroust, “Ancient Republican Rome,” 105–06.

³⁷⁹ Cappelletti and Gordley, “Legal Aid,” 349.

³⁸⁰ Chroust, “Ancient Republican Rome,” 106.

³⁸¹ Ibid., 136; Pound, *Jurisprudence*, 697.

³⁸² Cappelletti and Gordley, “Legal Aid,” 349; Chroust, “Ancient Republican Rome,” 136.

³⁸³ Cappelletti and Gordley, “Legal Aid,” 349.

³⁸⁴ Chroust, “Ancient Republican Rome,” 136–37.

³⁸⁵ Pound, *Jurisprudence*, 697.

from clients, not as a fee but as a sign of gratitude, and ultimately to the charging of fees. In this way, the profession became increasingly profitable.

A central cause of these changes was the emergence of the “forensic orators”. This new breed of lawyers, somewhat equivalent to what would be called barristers in modern England, had the responsibility for presenting the cases of clients in court. Unlike barristers however, the forensic orators typically did not deem it necessary to master the law, prioritizing instead the mastery of rhetoric.³⁸⁶ Being masters in the arts of theatrics and persuasion, they increasingly began to exercise decisive control over the course and outcome of litigation. Accordingly, they could demand top remuneration for their services and, often being of humbler origin than the old class of aristocratic jurist-lawyers, they were more inclined to do so.³⁸⁷ With the passing of time, they gradually began to displace the aristocratic lawyer and the logic underpinning gratuitous legal work.³⁸⁸

Echoing Ancient Athens, as concerns began to grow about the increasing cost of justice, a statute was passed in 203 BC forbidding lawyers from taking payment or accepting gifts for acting on legal cases.³⁸⁹ When this failed to halt the decline of the noble ethos and the gratuitous provision of legal services, another law was introduced - the *lex Cincia* - imposing several penalties on lawyers accepting payment for their services. It seems that the *lex Cincia* was not entirely successful either - it ultimately became a dead letter - and so it was followed by the introduction of a cap on lawyers’ fees.³⁹⁰ Lawyers taking more than the specified cap would be liable for prosecution. When this too failed, parties themselves were required to take an oath that they had not provided any payment in advance of litigation, although they would be permitted to make payment not exceeding the capped amount upon conclusion of the litigation.³⁹¹

Ultimately, it seems to have proved impossible to halt or control the commodification of legal practice, such that it became a very lucrative profession enabling many lawyers to become

³⁸⁶ Chroust, “Ancient Republican Rome,” 117–23.

³⁸⁷ *Ibid.*, 117–23, 128, 129, 137.

³⁸⁸ *Ibid.*, 123, 124.

³⁸⁹ Pound, *Jurisprudence*, 697.

³⁹⁰ *Ibid.*

³⁹¹ *Ibid.*

exceedingly wealthy.³⁹² No organized system of catering for the legal needs of the poor emerged to replace the *clientele* system or the ethos of *noblesse oblige* that underpinned it.³⁹³

Beyond this, the Digest of Justinian does refer to an intriguing practice. The Digest provides that any proconsul (governor of a Roman province) is under a duty to:

“allow the use of counsel by petitioners who are: women, [orphans], those otherwise under a disability, or those who are out of their minds, if anyone seeks this for them. Even if there be no one to seek it, he ought to give them it anyway. But if someone should represent himself as being unable to find an advocate because of his opponent's power, it is just as much incumbent on the proconsul to give him one... it is wrong for anyone to be oppressed by the sheer power of his opponent...”³⁹⁴

As some have pointed out, it is not clear that this measure sought to address the legal needs of the poor and it rather seems to be oriented towards the needs of those who are (politically) weak.³⁹⁵ Indeed it should be no surprise that political power imbalance was a primary concern in a world where your social status and thus your political clout determined much of the course of your life.³⁹⁶ Nevertheless, if we construe political inequality in the Roman Republic as a functional equivalent of economic inequality in the contemporary world, then perhaps the passage from the digest demonstrates some concern for the legal needs of those who are relatively worse off in society (however that might be measured). Having said that, it is questionable how broad an impact such a provision could have, given that it would only impact those persons coming up against powerful adversaries in court and leave untouched the many other legal needs of poor and weak persons. Moreover, it is arguable that such a provision was merely a manifestation of the aristocratic practice of law and that it was honored only to the extent that the aristocratic class of lawyers continued to honor it, rather than representing a broader commitment of the legal profession as a whole.

³⁹² Chroust, “Ancient Republican Rome,” 137.

³⁹³ Cappelletti and Gordley, “Legal Aid,” 349.

³⁹⁴ Watson, *Digest of Justinian*, 35.

³⁹⁵ Robertson, Lynch, and Noone, “Pro bono as professional legacy,” 101; Cappelletti and Gordley, “Legal Aid,” 350.

³⁹⁶ Robertson, Lynch, and Noone, “Pro bono as professional legacy,” 100.

As with Ancient Athens, we must ultimately conclude that the Roman Republic only produced semi-organized models of pro bono. Pro bono predominantly took shape against the system of patronage and the political inequality that resulted from this system. We might further note that, as the practice of law became professionalized, a demand for pro bono emerged that was then conceived in terms of aristocratic duty or honor (a consequence of the socio-political profile of legal practitioners during this period). Again, the literature does not reveal any obviously cause-oriented pro bono practice, in the pursuit of specific political agendas or policy goals. This is not to say that this never occurred in Republican Rome, but this does not seem to have been a primary rationale within the *clientele* system. Pro bono practice in the aristocratic tradition seems, to some extent, to have been a consequence of a broader (sometimes self-interested)³⁹⁷ commitment to public service. As legal practice evolved and ceased to be a “gentleman’s hobby” and became increasingly professionalized and monetized, this model of pro bono seems to have been undermined. However, at the same time, as with Ancient Athens, against this backdrop, we can see the emergence of growing concerns for access to justice (defined narrowly), in the attempt to halt the commodification of legal services and institutionalize political protection within the legal system for various categories of indigent individuals.

1.2 The Middle Ages

During the Middle Ages, we see the emergence of more institutionalized models of pro bono. As the Christian Church became increasingly influential and more organized legal professions began taking shape in Europe, there arose a number of practices broadly concerned with ensuring access to justice, defined in terms of enabling poor and disadvantaged persons to access the legal system and providing them with legal representation. Such legal services were provided at first by Church officials and later by the legal profession at no cost or low cost. The rationales for such practices included Christian charitable duty and, subsequently, an emerging sense of professional duty. Again, what is evident, is how the shape of the legal profession and the powerful institutions and defining political and social relations of the day determine the shape that pro bono takes.

³⁹⁷ Chroust notes that “the old aristocrat of the Roman Bar was primarily interested in serving the Republic and in gaining popularity, fame and prestige, and possibly an exalted position in the administration of the commonwealth. And there was no more successful mode of securing all this than gratuitous legal services.” Chroust, “Ancient Republican Rome,” 137.

The ascendance of Christianity during the Roman Empire had a very significant impact on morality within the Roman world and, in particular, attitudes towards the poor. Scripture mandated that the poor, needy and weak should be spared from oppression and judged impartially in legal disputes.³⁹⁸ In 451, the Council of Chanceldon took a formal position on the appropriate role of Clergy with respect to legal needs of the disadvantaged. The Acts of the Council provided that:

“...in future no bishop or cleric or monk is to lease estates or involve himself in the secular administration of business, unless he is strictly required by the laws to take on the compulsory guardianship of minors or if the bishop of the city entrusts him with responsibility, out of the fear of God, for church property or for orphans and destitute widows and people who especially need the help of the church.”³⁹⁹

It has been suggested that this represents the first formal position taken by the Church with respect to legal aid.⁴⁰⁰ On the other hand, it might be said that this passage more accurately represents the commitment of the Church to place the indigent, the powerless and the neglected under the broad philanthropic care of the Church, rather than reflecting a specific policy on legal aid. Whatever the case, it is clear that from this period onwards, the Church began to produce a range of doctrine and practice concerned with the legal needs of those persons coming under the protection of the Church.⁴⁰¹

In terms of doctrine, Gratian (jurist and author of the *Decretum Gratiani*) writing in 1140, submitted that bishops might find glory in catering for the legal needs of the poor.⁴⁰² Meanwhile Stephen of Tournai (a Roman Catholic Canonist who would later become a bishop) writing in 1160, suggested that bishops were obliged to afford legal protection to the disadvantaged even where their own resources were limited and, moreover, that catering for such legal needs should be prioritized over other, less important, work.⁴⁰³ In many respects, as one commentator put it, “Bishops became patrons of the poor”.⁴⁰⁴ Like the state priests and the

³⁹⁸ Deut. 24:14; Prov. 14:20. See Brundage, “Legal aid for the poor,” 170. See also Robertson, Lynch, and Noone, “Pro bono as professional legacy,” 103.

³⁹⁹ Price and Gaddis, *Council of Chalcedon*, 95.

⁴⁰⁰ Brundage, “Legal aid for the poor,” 170; Robertson, Lynch, and Noone, “Pro bono as professional legacy,” 103.

⁴⁰¹ Brundage, “Legal aid for the poor,” 170, 171; Cappelletti and Gordley, “Legal Aid,” 351.

⁴⁰² Brundage, “Legal aid for the poor,” 170.

⁴⁰³ Ibid., 171.

⁴⁰⁴ Robertson, Lynch, and Noone, “Pro bono as professional legacy,” 103.

patronus of the early Republican Roman period, bishops and other clergy provided broad protective services to the poor extending beyond merely legal needs, (although they were dissuaded from engaging in business dealings - commerce and trade - on behalf of the poor).⁴⁰⁵ However, this obligation arose not from a sense of aristocratic duty, but from the doctrine of *charitas* and Christian duty.⁴⁰⁶

In terms of practice, initially, Christian men provided free legal services, often referred to as *pro deo* (for God),⁴⁰⁷ as pious work in spontaneous acts of charity. For example, Saint Yves of Brittany ("a lawyer and yet not a thief, to the wonder of the people") provides an iconic example and was even canonized for his work for the impoverished.⁴⁰⁸ However, in time, the Church produced more sophisticated and institutionalized forms of *pro bono*.

A first practice, tolerated by the secular courts of England and France, was to have the Church take jurisdiction over litigation involving the indigent and disadvantaged in the ecclesiastical courts. Indeed, respected canon law interpreters suggest that the Church had jurisdiction over all litigation where the poor and disadvantaged were parties.⁴⁰⁹ However, the Church's protective net was not infinite in scope. There are examples of thresholds being set. Wealthy widows, for instance, who were considered capable of protecting their own interests, were not to come under the jurisdiction of the Church.⁴¹⁰ Moreover, there were some who felt that the Church should not, at least in the first instance, exercise jurisdiction over claims pursued by the impoverished for personal monetary gain.⁴¹¹

A second and related practice was the institution of the *advocatus pauperum deputatus et stipendiatus*, an official employed by the Church and paid to represent the poor in ecclesiastical courts.⁴¹² Ultimately, this model travelled and was documented in both the secular courts of France and in the free communes of Italy.⁴¹³

⁴⁰⁵ Brundage, "Legal aid for the poor," 171; Robertson, Lynch, and Noone, "Pro bono as professional legacy," 103.

⁴⁰⁶ Cappelletti and Gordley, "Legal Aid," 351.

⁴⁰⁷ Huls, "Pro Deo Practice," 333.

⁴⁰⁸ Cappelletti and Gordley, "Legal Aid," 351.

⁴⁰⁹ Brundage, "Legal aid for the poor," 171.

⁴¹⁰ *Ibid.*, 171, 172.

⁴¹¹ *Ibid.*, 172.

⁴¹² Cappelletti and Gordley, "Legal Aid," 351.

⁴¹³ *Ibid.*

A third practice encouraged by the Church, which also spread to secular courts, was to instruct magistrates to waive the court fees of the poor and sometimes to appoint a private lawyer or a member of the clergy to represent them free of charge (acting for God) or for a small fee.⁴¹⁴ This practice was documented in France, England, Italy and Germany.⁴¹⁵ Great pressure was exerted on lawyers to accept instruction and they might even face debarment for refusing without a compelling justification (such as a conflict of interest).⁴¹⁶ It has been suggested that these cases would have typically been offered to new advocates, recently admitted to practice.⁴¹⁷ However, there is no evidence that these cases were treated with less care or carried out at a lower standard of legal diligence.⁴¹⁸

It has been said that these practices of the Church (and secular courts) in the 12th, 13th and 14th centuries, should not be confused with contemporary legal aid practices.⁴¹⁹ It is said that the motivation behind these practices, and the society that underpinned them, were vastly different to the modern world. The practices were still typically quite sporadic in nature rather than being extensive attempts to resolve questions of legal need. Moreover, they grew out of a context of “pervasive inequality” and the Lord-Vassal relationship or paternalism of the Church.⁴²⁰ In any event, the Church combined the idea of *charitas* and the duties it imposed with a range of organized and institutionalized approaches to providing legal assistance to the needy. On this basis one might argue that the Church was able to significantly transcend the ad hoc and semi-organized approaches of Ancient Athens and Republican Rome and move towards a more organized model of “pro bono”.

The influence of the Christian ideology of charity and the practices it spawned, as we have already seen, spread to the secular courts and slowly began to be embraced by the legal systems and emerging legal professions of Europe. Indeed, from the 13th century, we see the materialization of thinking about free legal assistance as a *professional duty*.⁴²¹ In Modena, for example, while providing free representation to indigent clients had emerged as a duty of the clergy, with time, as the legal profession took shape, the responsibility shifted to the city’s legal

⁴¹⁴ Brundage, “Legal aid for the poor,” 173; Cappelletti and Gordley, “Legal Aid,” 351.

⁴¹⁵ Cappelletti and Gordley, “Legal Aid,” 352.

⁴¹⁶ Brundage, “Legal aid for the poor,” 173.

⁴¹⁷ *Ibid.*, 178, n. 39.

⁴¹⁸ Robertson, Lynch, and Noone, “Pro bono as professional legacy,” 104.

⁴¹⁹ Cappelletti and Gordley, “Legal Aid,” 352.

⁴²⁰ Robertson, Lynch, and Noone, “Pro bono as professional legacy,” 104.

⁴²¹ *Ibid.*

guild.⁴²² The municipal statutes of Modena stipulated that lawyers must provide for the legal needs of the poor, widows and orphans without taking any fees or other compensation.⁴²³

This was a period during which several European city-states began taking steps to cater for the legal needs of the indigent and disadvantaged. That cities turned to the legal profession to provide solutions must be seen in the context of the fact that it was during this period that lawyers across Europe began to define themselves as a distinct profession with certain ethical standards and professional duties.⁴²⁴ Such pro bono practice was conceived by the profession as a charitable duty and perhaps even as a mark of chivalry or honor.⁴²⁵ In the words of one commentator, “medieval lawyers regarded it as one mark of their superiority to other craftsmen that they furnished their specialized skills to economically and socially disadvantaged persons without compensation”.⁴²⁶ For centuries to come this would be the *status quo*; providing legal assistance to the needy and impoverished remained an “honorific duty” of the European legal professions, reliant on “the charity and goodwill of the bar”.

1.3 The Early Modern Era

During the Early Modern Era, we see the proliferation of a range of novel models of pro bono across Europe, taking shape within a number of different legal practice sites. As law began to affect more and more parts of individuals’ lives, and the legal profession became increasingly differentiated, not only the Church and the organized bars, but also law schools, municipalities, trade unions and civil society increasingly began to develop a range of organized and institutionalized models of pro bono. The clients included not only the poor and disadvantaged, but also persons who received pro bono primarily as a consequence of their membership within social groups (such as trade unions). The services provided included the provision of legal information, basic assistance with legal documentation and representation. The rationales included a sense of charity, professional duty and communal solidarity, as seen in earlier eras, as well as, increasingly, notions of social contract theory, i.e. the belief that as members of a given political community, individuals were granted a number of rights and that for such rights

⁴²² Brundage, “Legal aid for the poor,” 174, 175.

⁴²³ *Ibid.*, 174.

⁴²⁴ *Ibid.*, 175. This is evidenced in part by increased regulation of their practice and growing specialization. See Robertson, Lynch, and Noone, “Pro bono as professional legacy,” 104, 105.

⁴²⁵ Cappelletti and Gordley, “Legal Aid,” 353.

⁴²⁶ Brundage, “Legal aid for the poor,” 175.

to be meaningful, individuals must have access to the machinery of justice (i.e. access to justice defined narrowly). Indeed, throughout the early modern era, we see the beginnings of an emerging consensus in Europe around the importance of access to justice, defined in this way, as formal and substantive accessibility to legal procedures and processes.

In the 17th and 18th centuries, the idea emerged, often in constitutional form, that the state should be the protector of the rights of man.⁴²⁷ According to this idea, the state would protect the rights of its people (“We, the People”) from being unduly encroached upon either by fellow citizens or by the state itself. To guarantee justice in this manner required, at least in theory, equal access to justice and the machinery of justice (i.e. the courts and the legal process). Crucially, however, such constitutional guarantees of equal access to justice and much of the similarly targeted legislation that would emerge in the subsequent years (into the 19th century) existed only on paper and in theory. Such laws were not directed at actually creating, funding or institutionalizing organized state-run systems for the provision of legal services to those in need.⁴²⁸ To the contrary, these were normative declarations, effective only to the extent that the legal profession, acting charitably, made them so. This state of affairs would continue into the 20th century.

Consequently, while the 19th century saw the emergence of legal aid legislation and even fully fledged nationally prescribed “proto-legal aid systems” in Belgium (1810 – amended 1889), France (1851), Italy (1865), and Germany (1877), these systems were more akin to a form of organized pro bono practice than they were to contemporary state-sponsored legal aid.⁴²⁹ For example, in Belgium, the bars were required to establish legal consultation bureaus tasked with providing legal advice to the poor.⁴³⁰ Such bureaus were staffed with private lawyers working voluntarily, on a rota system. Meanwhile, in France, financial barriers to litigation for the poor were removed; unpaid lawyers were appointed to serve at no cost and court fees were waived.⁴³¹ Similarly, in Italy, the legal profession was *declared to be under a duty to provide legal aid at no cost*, which, as in France, was to be accomplished by appointing lawyers to work for free and waiving court fees.⁴³² In Germany, the Code of Civil Procedure of 1877

⁴²⁷ Cappelletti and Gordley, “Legal Aid,” 354, 355.

⁴²⁸ Ibid.; see also Jacoby, “Legal Aid to the Poor,” 940–41, for an interesting discussion in this context on the equal protection clause of the US constitution in the 1940s.

⁴²⁹ Cohn, “Legal aid for the poor,” 254; Cappelletti and Gordley, “Legal Aid,” 356.

⁴³⁰ Cohn, “Legal aid for the poor,” 254, 255.

⁴³¹ Cappelletti and Gordley, “Legal Aid,” 356.

⁴³² Ibid.

empowered judges to appoint lawyers and waive costs for litigants who could demonstrate their poverty.⁴³³ Similar provisions were in place right across Western Europe: Iceland (1907), Spain (1881), Luxembourg (1893), San Marino (1884).⁴³⁴ It is perhaps unsurprising that such legislation emerged at a time that coincides with the emergence of the modern welfare state. The European welfare state is typically traced back to the introduction of social insurance programs in Germany, enacted to protect against risks inherent in industrial economies, namely the potential loss of income from contingencies such as old age, sickness or unemployment.⁴³⁵ It should be no surprise that the priority emerged in Bismarck's Germany, in the context of the formative German nation state centered around the booming, industrial metropolis of Berlin, replete with increasing social tensions the state sought to mitigate. Germany introduced an industrial accident insurance program in 1871, becoming the first social insurance program in Europe, followed by the first health insurance and pension programs in the 1880s, and this social innovation quickly spread.⁴³⁶

All of the developments above provide clear evidence of the state playing an increasingly significant role, at least at a policy level, with respect to the provision of legal services for the poor and, indeed, this was to be the general trajectory in the coming decades.

Ultimately, however, in all of these systems, providing legal services to those unable to afford them was still, first and foremost, a *charitable duty of the profession*. All of these arrangements relied on “the charity and goodwill of the bar” and legal aid was understood as an “honorific duty” of the European legal professions.⁴³⁷ The argument has been made that relying on the profession to charitably take responsibility for the provision of free legal services in this manner will “quite predictably, [be] ineffective”.⁴³⁸ The basis for such claims being that the profession, being naturally inclined to prefer and prioritize remunerative work, would both fail to allocate the resources necessary to sincerely tackle the problem of unmet legal needs and would erect all manner of barriers to access, thus minimizing the amount of this work they would be required to undertake.⁴³⁹ Moreover, such work would, the argument goes, also likely

⁴³³ Ibid.

⁴³⁴ Spain: Law on Civil Procedure of Feb. 3, 1881; Iceland: Law of Nov. 16, 1907; San Marino: Law on Legal Aid for Poor Persons, Dec. 20, 1884; Luxembourg: Law on Legal Aid, Mar. 23, 1893. See League of Nations, *Legal Aid for the Poor*, V. Legal 1927.

⁴³⁵ Pierson, *Beyond the Welfare State?* 103.

⁴³⁶ Ibid.

⁴³⁷ Cappelletti and Gordley, “Legal Aid,” 358.

⁴³⁸ Cappelletti and Garth, “Access to justice,” 197.

⁴³⁹ Cappelletti and Gordley, “Legal Aid,” 359, 360.

be reserved for young, inexperienced or unsuccessful lawyers.⁴⁴⁰ While there is likely much truth to this, we should not let that blind us to some of the incredibly ambitious and largely altruistic initiatives embarked upon by parts of the legal profession in Europe during this era.

For example, in Denmark in 1885, the Danish bar association established the institution of the *Retshjaelp*.⁴⁴¹ This was essentially an organization based in Copenhagen and tasked with coordinating the provision of legal services to the poor by private lawyers and student clerks, both acting voluntarily. The *Retshjaelp* employed just one paid staff member – a clerk who would take preliminary details about clients and their legal queries – and was run on a shoestring budget of just over £10,000 per year (at 2005 conversion rates).⁴⁴² Beyond this, the lawyer-student teams would see poor clients and provide advice in relation to their queries related, for example, to securing financial support for foster children, debt matters, divorce, landlord-tenant disputes and so on. Very often, such advice would be of a common sense or practical nature rather than strictly legal advice and would, with a few exceptions, not involve legal representation.⁴⁴³ While clearly this was a relatively small operation, having just four consultation rooms, the *Retshjaelp* could receive upwards of 15,000 applications for assistance each year and process over 5000 of these.⁴⁴⁴ Running of the *Retshjaelp* was, at some stage taken over by the Society of Students, based at the University of Copenhagen and, by 1927, similar organizations had been established in several provincial towns across Denmark.⁴⁴⁵

Other, similar institutions have been documented, for example the “Legal Dispensary”, founded by a private lawyer at the law school of Edinburgh in Scotland in 1900.⁴⁴⁶ The Dispensary offered free legal advice to anyone who wanted or needed it (provided their income did not exceed £12 per month – approximately £700 per month at 2005 rates) and aimed to avoid litigation by resolving disputes early.⁴⁴⁷ The Dispensary handled around 1500 consultations per year by 1915 and nearly 4000 by 1939.⁴⁴⁸ Interestingly, the Dispensary was staffed largely by women, with student volunteers passing through and around 30 qualified lawyers supervising. This was due to the fact that, although able to study law and obtain law

⁴⁴⁰ Ibid., 360.

⁴⁴¹ Jessel, “Poor Man’s Lawyer,” 177.

⁴⁴² Based on <http://www.nationalarchives.gov.uk/currency/>.

⁴⁴³ Jessel, “Poor Man’s Lawyer,” 181, 182.

⁴⁴⁴ Ibid.

⁴⁴⁵ League of Nations, *Legal Aid for the Poor*, V. Legal 1927, 423, 425.

⁴⁴⁶ MacQueen, “Lawyers’ Edinburgh,” 11.

⁴⁴⁷ Ibid.; Egerton, *Legal Aid*, 38.

⁴⁴⁸ Egerton, *Legal Aid*, 38.

degrees, women were not yet permitted to practice.⁴⁴⁹ The Dispensary recognized the value of these educated and skilled women and actively recruited them to join its ranks.⁴⁵⁰ A similar organization was established at the University of Glasgow.⁴⁵¹

Another institution that emerged during this period, at least superficially reminiscent of the legal protection systems operated by Ancient Athenian townships (discussed above), was the municipally organized legal aid bureau. This institution, documented in Poland, Germany, Switzerland, the Netherlands, Finland, Estonia, Norway and Sweden involved municipalities – working with the profession – in maintaining legal aid offices to provide free legal advice to the poor.⁴⁵² For example, in Sweden, commencing in Gothenburg in 1872, followed by Stockholm in 1884, a so-called “Poor Man’s Advocate” system was established.⁴⁵³ Each municipality effectively appointed a private lawyer, on a part-time basis, to handle the legal queries of residents.⁴⁵⁴ Within a few decades nearly every major Swedish city had adopted the system. These offices (i.e. municipally organized legal aid bureaus), at least those in the Nordic countries, were apparently initially founded by privately practicing labor lawyers and then subsequently taken over by the municipalities.⁴⁵⁵ They focused largely on family law, labor law and housing law.⁴⁵⁶ The Swedish offices, handling around 15,000 consultations annually by 1912, were ultimately taken over by the Swedish state and transformed into a network of state-sponsored legal aid bureaus in 1919.⁴⁵⁷

Meanwhile, in Danzig (modern-day Gdańsk), a “Legal Information Bureau” was established by the municipal authorities in 1908.⁴⁵⁸ The Bureau provided free legal advice and assistance in preparing legal documents to “any poor person” domiciled or working in the municipality.⁴⁵⁹ In addition, the Bureau provided advice in relation to relevant industrial and social legislation.⁴⁶⁰ The Bureau was run by a Director, appointed by the municipality, who was

⁴⁴⁹ Interview number 35, June 6, 2016.

⁴⁵⁰ Ibid.; MacQueen, “Lawyers’ Edinburgh,” 11.

⁴⁵¹ Egerton, *Legal Aid*, 38.

⁴⁵² Cohn, “Legal aid for the poor,” 257; Blankenburg and Cooper, “Survey of Literature,” 276; see also, generally, League of Nations, *Legal Aid for the Poor*, V. Legal 1927.

⁴⁵³ Cohn, “Legal aid for the poor,” 258; Egerton, *Legal Aid*, 45.

⁴⁵⁴ Cohn, “Legal aid for the poor,” 258.

⁴⁵⁵ Johnsen, “Nordic Legal Aid,” 304.

⁴⁵⁶ Ibid.

⁴⁵⁷ Egerton, *Legal Aid*, 45.

⁴⁵⁸ League of Nations, *Legal Aid for the Poor*, V. Legal 1927, 113.

⁴⁵⁹ Ibid.

⁴⁶⁰ Cohn, “Legal aid for the poor,” 255.

supported by various official and unofficial staff (most likely legal volunteers or perhaps students).⁴⁶¹ Beyond the free state of Danzig, the municipality of Warsaw had also established a “legal consultation” bureau in 1915, and the Polish Minister of Interior had even issued a circular in 1919 requesting all municipal councils to set aside funds in their budgets to establish their own legal consultation bureau, each to be staffed by a private lawyer under contract with the bureau.⁴⁶²

Yet another example is provided by Germany where, before the turn of the 20th century, trade unions set up legal aid bureaus for workers to provide advice on accident insurance and social welfare law.⁴⁶³ Churches were also setting up their own legal aid bureaus and a statistical report from 1912 recorded some 916 legal advice bureaus of which around half were maintained by trade unions, 145 by church organizations, 119 by local municipalities and 93 by women’s legal aid organizations.⁴⁶⁴ Collectively they provided advice to 1.8 million citizens.⁴⁶⁵ In a similar vein, a report produced by the Austrian Department of Justice for the League of Nations revealed that, by 1926, there were nearly 90 unions providing free legal advice to their members across Austria, of which around 20 were Christian unions.⁴⁶⁶ Most of these unions reportedly retained lawyers to provide advice to their members and several also established legal aid offices for this purpose. The work of these unions included the free provision of both advice and representation. However, advice was only provided relating to conflicts arising in the workplace and matters related to social insurance and, moreover, there were requirements related to membership duration.⁴⁶⁷ Similar practices were documented in Czechoslovakia (trade unions providing free legal advice to their members), Danzig (trade unions providing free legal advice to their members), greater Poland (trade unions providing free legal advice to their members), Hungary (trade unions and organizations run by the Church providing free legal advice) and Latvia (a tenants association providing free legal advice to its members).⁴⁶⁸ No doubt such organizations were pervasive across much of Europe.

⁴⁶¹ League of Nations, Legal Aid for the Poor, V. Legal 1927, 113.

⁴⁶² Ibid., 208, 450.

⁴⁶³ Blankenburg and Cooper, “Survey of Literature,” 281.

⁴⁶⁴ Ibid.

⁴⁶⁵ Incidentally, all of these organizations were subsequently dissolved in 1933/34 by the Nazi regime and their functions were ostensibly absorbed by the *Rechtsfürsorge*. See Blankenburg and Cooper, “Survey of Literature,” 281.

⁴⁶⁶ League of Nations, Legal Aid for the Poor, V. Legal 1927, 413, 414.

⁴⁶⁷ Ibid.

⁴⁶⁸ Ibid., 423, 424, 439, 443, 451.

A final example worth mentioning comes from Romania, where the national bar association had developed their own self-organized legal aid system.⁴⁶⁹ Under the regulating statute of the Order of Advocates (the national Romania bar association), each local branch (“Council”) of the Romanian bar, was required to organize the provision of free legal assistance in its area by setting up a “legal assistance bureau”. Councilors employed by each local Council were given this responsibility.⁴⁷⁰ To help run the bureau, they relied on both voluntary assistance provided by private lawyers and the services of salaried lawyers (paid by the Council specifically for this purpose). Where a private lawyer was requested to act on a pro bono basis for a client by the bureau, compliance was compulsory (including with respect to providing assistance with litigation). Meetings among bureau staff and volunteers were to be held daily or at least twice a week. Persons winning monetary sums as a consequence of litigation engaged in by the bureau would be required to compensate the bureau after the fact. Senior lawyers were to be assigned to legal aid matters that were of particular importance and, astonishingly, a sum was to be set aside by the Order of Advocates (i.e. the national bar) and distributed as a form of bonus to private lawyers “who distinguish[ed] themselves in legal-aid work”.⁴⁷¹ Somewhat similarly, in France the Order of Advocates (French bar) established its own network of legal aid bureaus (outside of the official legal aid legislation passed by the state, mentioned above) in Paris and the provinces.⁴⁷² Similar arrangements were also in place in Latvia, Poland and Hungary.⁴⁷³

We can say confidently that during the 19th and early 20th century, organized pro bono practice really took root across much of Europe (to be clear, it was not referred to as “pro bono” and responded to very different needs and engaged different stakeholders to contemporary “Big Law Pro Bono” i.e. the central object of analysis in this thesis). As various social institutions began to play increasingly important roles in the lives of citizens, and the law (now professionalized and monetized) spread its web across an increasing array of social practices, need for legal services emerged. Private lawyers self-organized, often collaborating with universities, local municipalities, civil society organizations, trade unions, political parties and the Church to address the problem of unmet legal need sometimes in incredibly creative ways.

⁴⁶⁹ Ibid., 209, 452.

⁴⁷⁰ Law concerning the Organisation and Unification of the Order of Advocates, Aug. 29, 1925. See League of Nations, Legal Aid for the Poor, V. Legal 1927, 209–11.

⁴⁷¹ Ibid.

⁴⁷² Ibid., 430.

⁴⁷³ Ibid., 439, 443, 450.

There appears to have emerged a clear and very often acknowledged duty, extending to the legal professions across Europe, to take responsibility for the provision of legal services to the poor. The professions of Europe responded, right across the continent, such that by the beginning of the 20th century the provision of legal services to the disadvantaged had reached a new level of sophistication and institutionalization. Moreover, private lawyers, receiving no remuneration, had very often led these efforts rather than shirking their responsibilities, as some might have expected them to do. The primary objective that unites these efforts is promoting access to justice (defined narrowly). However, we can see some other objectives creeping in, notably legal training and moral education, as the models become more sophisticated.

1.4 The 20th Century

Throughout the early and mid-20th Century, we see the continuation of organized pro bono practice and the emergence of what might be broadly termed an “access to justice movement”, or perhaps access to justice *movements* (narrowly defined) within parts of Europe. However, we also see the continuation of the gradual constitutionalization of the access to justice norm (that had started in the 19th Century) and the institutionalization of that norm in the form of state-funded legal aid systems. While new models of organized pro bono continued to proliferate, these often functioned as prototypes for, or compliments to, highly organized and significantly institutionalized state-funded systems. Consequently, as will be explored more in Chapter 5, the structure of the legal profession began to change and in some parts of Europe (particularly the North-West), there gradually emerged a “Social Bar”,⁴⁷⁴ specialized in the provision of legal services to the poor and disadvantaged. Pro bono services provided throughout this era continued to focus on the provision of legal information to low-income individuals and basic assistance with legal documentation and representation for those individuals. The dominant rationales during this era continued to be professional duty, charity and social contract theory (as discussed above). However, there is an increasing move away from charity and professional duty as the dominant rationales, towards social contract theory.

⁴⁷⁴ The “Social Bars” of Europe have become organized to some extent, forming associations for legal aid lawyers, family lawyers, children’s rights lawyers, immigration lawyers, etc. Member of this professional subgroup tend to receive lower levels of remuneration than the mainstream of the profession, and they are often situated geographically in poorer neighbourhoods or outside of capital cities. The concept of a “Social Bar” seems to have been first coined by German Sociologist, Erhard Blankenburg, in 1982 when referring to the experience of legal aid in the United Kingdom and the Netherlands. See Blankenburg, Erhard, “European Experience in Innovating Legal Services,” 248.

Not by accident, this coincides with the expansion of modern welfare states across parts of Europe. Indeed, during this period, as in earlier eras, the political and social developments of the era have a significant impact on the models of pro bono that emerge and the manner in which pro bono is deployed.

Some of the first European countries to move away from organized models of pro bono based primarily on the charity of lawyers, towards more institutionalized models under which lawyers were remunerated by the state, were Sweden (1919) and Germany (1923). As noted above, in 1919, the Swedish government took the step of “nationalizing” the municipal Poor Man’s Advocate offices that had been set up independently by private lawyers and municipal authorities in various Swedish towns since 1872.⁴⁷⁵ In 1919 the Law Concerning Free Legal Proceedings and the Royal Decree Concerning the Grant of Government Subsidies to Public Legal Aid Institutions went into force. These laws provided for both state financing of poor persons’ litigation fees and the subsidization of a national network of legal aid bureaus.⁴⁷⁶ The bureaus would qualify for state funding provided that they submitted to various forms of state regulation and monitoring (for instance related to governance and statistical information sharing).⁴⁷⁷ The costs of the bureaus were shared between the state and the local municipality (approximately a 25/75 split) and the funding would go towards a director, a number of salaried lawyers and clerical staff and various office and travel costs.⁴⁷⁸ Such bureaus could handle tens of thousands of queries and thousands of cases each year (significantly more than the Poor Man’s Advocate offices that had operated on a voluntary basis and had not generally engaged in litigation work).⁴⁷⁹ This Swedish system of state and municipality funded legal aid bureaus was later also introduced in Finland.⁴⁸⁰ Meanwhile, in Germany, taking a slightly different approach, the 1923 Law on the Reimbursement of Lawyer’s Fees in Poverty Cases allowed German lawyers acting for the poor to recover their full fees from the state (although the amount was subsequently capped and then reduced).⁴⁸¹ Lawyers were to be appointed at the discretion of the court and, once appointed, obliged to take instructions and permitted to claim

⁴⁷⁵ Egerton, *Legal Aid*, 45; Cohn, “Legal aid for the poor,” 258, 259.

⁴⁷⁶ Johnsen, “Nordic Legal Aid,” 304.

⁴⁷⁷ Egerton, *Legal Aid*, 45, 46; Cohn, “Legal aid for the poor,” 258, 259.

⁴⁷⁸ Cohn, “Legal aid for the poor,” 258, 259.

⁴⁷⁹ *Ibid.*, 260.

⁴⁸⁰ *Ibid.*

⁴⁸¹ Cappelletti and Gordley, “Legal Aid,” 371.

their fees and disbursements from the state up to the capped amount.⁴⁸²

A second group of countries experimented with their own state-subsidized legal aid systems in the post-war period. Britain had taken tentative steps towards establishing a state-sponsored legal aid system in 1914 by establishing a state-funded “Poor Person’s Department” that relied on the voluntary services of private lawyers for both advisory and investigative work and also representation in litigation.⁴⁸³ The system was then placed under the administration of the Law Society (a private organization representing the interests of the legal profession) in 1925 and ultimately scrapped after the war when, after much intense debate, the Legal Aid and Advice Act was passed in 1949. Contrary to the German and Swedish systems, qualifying legal aid candidates were able to select for themselves the lawyer they desired from a range of private practitioners who had agreed to take on such cases, i.e. allowing for competition between lawyers for legal aid cases.⁴⁸⁴ The selected lawyers would then be compensated by the state. Notably, the Law Society was still responsible for administering the scheme.⁴⁸⁵

The historical context of the Second World War was critical to the emergence of the modern legal aid system in Britain. So-called “Citizen’s advice bureaux” (or “CABs”) first cropped up in England shortly after the outbreak of the Second World War and the institution gradually spread across the country.⁴⁸⁶ In the first instance, CABs were not created to address legal problems, but rather to assist individuals with all manner of practical and administrative problems arising as a consequence of the war and the instability that it created (also consequent upon the introduction of emergency legislation). In time, however, local lawyers began volunteering their services in CABs across England and thus enabling them to provide legal advice and sometimes even pursue litigation.⁴⁸⁷ In time, the CABs began to provide advice on a range of issues relevant to those within their communities, such as housing, employment and family matters. These CABs effectively operated as a “proof of concept” for the state-funded legal aid system that emerged in the subsequent years.

Around the same period, following a debate that had been kicked off in the early 50s, the Netherlands followed a similar path in 1957 when the Act on Legal Aid for People of No-or of

⁴⁸² Stone, “European legal aid offices,” 62.

⁴⁸³ Cappelletti and Gordley, “Legal Aid,” 356, 357.

⁴⁸⁴ *Ibid.*, 356, 374.

⁴⁸⁵ Blankenburg and Cooper, “Survey of Literature,” 268.

⁴⁸⁶ Cohn, “Legal aid to soldiers,” 167.

⁴⁸⁷ *Ibid.*; Cohn, “Legal aid for the poor,” 258.

Poor Means was passed. This legislation established a state subsidy for legal aid provided to persons of low income.⁴⁸⁸ Similar to the Swedish system, the legislations also provided for the establishment of several legal aid bureaus consisting of appointed local lawyers, although at least 7 legal aid bureaus had already been established by municipal authorities and local lawyers by as early as 1925, nearly 30 years prior to the legislation.⁴⁸⁹ However, unlike the old network of bureaus, lawyers in the new state-sponsored bureaus would not actually be providing advice themselves, rather, they would review the legal queries of citizens and issue certificates to those persons who qualified for legal aid (based on the merit of their case and their income level).⁴⁹⁰ The certificates could then be taken to private lawyers who would take on the case with a guarantee of government funding.

Given the developments, described above, in the first half of the 20th Century, it is perhaps unsurprising that during this period, the principle of access to justice also came to be reflected in the case law of the European Court of Human Rights. With respect to criminal law, the European Convention (adopted in 1950) has always provided an explicit guarantee of the right to legal representation, including free legal assistance “when the interests of justice so require,” codifying, for all Council of Europe member states, many years of developing national law.⁴⁹¹ Subsequently, the Court also established a right to free legal assistance in civil matters (which is not explicitly mentioned in the text of the Convention). The Court first held in *Golder v. United Kingdom*, that the “right to fair trial” guaranteed in Article 6 of the European Convention implies a right to access to a court on civil matters.⁴⁹² It then expanded on the *Golder* ruling in *Airey v. United Kingdom*, to find that access to the Court could not be meaningful without the implied right to free legal assistance even in civil cases, depending on the complexity of the procedure or the type of case.⁴⁹³ The Court made that ruling despite the fact that Article 6 of the treaty specifies the right to free legal assistance in criminal matters, but says nothing about free legal assistance in civil matters. As a result of the *Airey* decision, and cases that followed it, European human rights guarantees include an inalienable right to

⁴⁸⁸ Blankenburg and Cooper, “Survey of Literature,” 276.

⁴⁸⁹ The old network also received a small state subsidy and so the changes introduced were a reform rather than complete innovation. League of Nations, Legal Aid for the Poor, V. Legal 1927, 446.

⁴⁹⁰ Blankenburg and Cooper, “Survey of Literature,” 276.

⁴⁹¹ “Everyone charged with a criminal offence has the following minimum rights: . . . (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.” Article 6(3), *European Convention on Human Rights and Fundamental Freedoms*.

⁴⁹² *Golder v. United Kingdom* 1975 ECHR 4451/70.

⁴⁹³ *Airey v. United Kingdom* 1979 ECHR 6289/73.

free legal assistance in civil cases, at least for complex matters of significance. However, the articulation of the right to legal assistance in civil matters emerged from the context, explored above, in which there had already been widespread acknowledgment at the national level of the government's obligation to make legal assistance available in both criminal and civil cases in appropriate circumstances.

In fact, the 1970s saw renewed interest in state-sponsored access to justice at the national level within Western Europe. During what has been labelled as the "law reform movement", many countries revisited their legal aid legislation or embraced for the first time the example initially set by Sweden, Germany, Britain and the Netherlands. Indeed, by some accounts, it was only in the 1970s that widespread state-sponsored legal aid was significantly institutionalized across the Western part of the continent.⁴⁹⁴ There were, for instance, key developments in France where a new law was introduced in 1972 replacing the charitable system that relied on the pro bono services of private lawyers and had been in place since 1851 (although subject to a few amendments).⁴⁹⁵ The new law introduced a legal aid scheme that was largely modelled after the British 1949 law, i.e. extending state subsidies to private practice lawyers.⁴⁹⁶ However, taking a far more modest approach, the French law would only subsidize lawyers for their expenses, rather than reimbursing their fees.⁴⁹⁷ Like the Dutch model, the system also relied on a network of legal aid bureaus, consisting mainly of government officials and several lawyers and typically attached to municipal or local courts, to vet applicants and clear them for legal aid.⁴⁹⁸ Meanwhile, for successful applicants, the lawyer was to be appointed at the discretion of the local bar association and would be able to represent the client in litigation (no compensation being provided for advisory work) with the state subsidizing any expenses.

During this same period, the Federal Republic of Germany enacted legislation to increase state compensation to private lawyers providing legal aid under its scheme,⁴⁹⁹ while Austria, the Republic of Ireland (with respect to criminal proceedings), Spain and the Netherlands took

⁴⁹⁴ In the early 1970s, a series of statutes were introduced across Europe (for example, in France (1972), Sweden (1972), Germany (1972), and Italy (1973)). See Cappelletti, "Legal aid in Europe," 206.

⁴⁹⁵ Loi du 3 Janvier 1972, No. 72, 11, JO para. 15.

⁴⁹⁶ Blankenburg and Cooper, "Survey of Literature," 286.

⁴⁹⁷ Ibid.; Cousins, "Legal Aid Reform," 137, 138.

⁴⁹⁸ Blankenburg and Cooper, "Survey of Literature," 287.

⁴⁹⁹ *Gesetz zur Änderung der Bundesrechtsanwaltsordnung, der Bundesgebührenordnung für Rechtsanwälte und anderer Vorschriften* of Oct. 24, 1972 [1972] BGBI I 2013 (W. Ger.).

similar measures.⁵⁰⁰

However, during this same period, other models of organized pro bono practice, not reliant on state funding, emerged across the European legal professions. During the 1960s and 1970s, Europe experienced something of a boom in the development of what have been collectively referred to as “neighborhood law centers”. These institutions were established in England, the Netherlands, Belgium and Norway.⁵⁰¹ In England, for example, the *law centre movement* of the 1970s saw an estimated 3,300 lawyers collaborating with community workers to provide heavily discounted legal assistance to persons who were not otherwise being serviced by the profession (in the model of a family/community doctor).⁵⁰² In the Netherlands and Belgium, during the same time period, there emerged a student led “*law shop*” (rechtswinkel/ wetswinkel/ boutique de droit) *movement* while in Norway there was the “*law bus*” (juss bus) *movement* (all of which will be discussed further in the next section).⁵⁰³ The central idea behind all of these movements was to involve law students and volunteer lawyers in the provision of free legal services to persons in poor communities and rural communities (falling beyond the reach of the mainstream legal community). Such developments can probably best be understood not as divergent from the move towards institutionalized state-sponsored legal aid, but as complementary and as emerging from the zeitgeist.

The following years, up until the end of the 20th Century saw legal aid spending in Western Europe spiraling, particularly in the UK, Sweden and the Netherlands.⁵⁰⁴ Notably, however, the same period saw countervailing trends in other parts of Europe. In France, the coverage of legal aid had declined precipitously between the 1972 reform (discussed above) and 1990, from 75% of the population to 34%, and the legal aid budget was some four times lower than Germany and 14 times lower than England and Wales.⁵⁰⁵ However, new legal aid legislation introduced in 1991 saw great increases in coverage and modest increases in spending throughout the 1990s.⁵⁰⁶ Meanwhile, in the Republic of Ireland, a network of government law

⁵⁰⁰ Cappelletti and Garth, “Access to justice,” 202; Cousins, “Legal Aid Reform,” 137, 138; Colomer, “Legal Aid in Spain,” 272.

⁵⁰¹ Garth, *Neighborhood Law Firms*, 52–63; Gibens, “Legal aid in Belgium,” 3–18.

⁵⁰² Boon and Whyte, “Charity and Beating,” 176, n. 44.

⁵⁰³ Garth, *Neighborhood Law Firms*, 118–29; and unpublished 2011 article on the origins of the Juss-Buss written by Jon T. Johnsen on file with author.

⁵⁰⁴ Goriely, “Legal aid in the Netherlands,” 811, nn. 38, 39; van den Biggelaar, “Legal Aid in the Netherlands,” 100; Cooper, “English Legal Services,” 254.

⁵⁰⁵ Cousins, “Legal Aid Reform,” 140, 141.

⁵⁰⁶ *Ibid.*, 141–43.

centers was established in 1980 employing specialized legal aid lawyers on the public payroll.⁵⁰⁷ Additionally, there were significant increases in spending on civil legal aid throughout the 1990s and ultimately also the extension of a government subsidy for private lawyers. (An initial call from the Minister of Justice in the early 1990s for the profession to make a pro bono contribution to legal aid were rejected.)⁵⁰⁸ Whatever the case, by the end of the 1970s, a consensus had emerged in Western Europe that the state had a role to play in sponsoring systems of legal aid for the poor.

A different path was taken in Central and Eastern Europe. Although, as evidenced above, the private bars of CEE countries had been very active in creating organized systems of pro bono in the 19th and early 20th centuries, this work was largely undone between the 1940s and the 1980s, during varying periods of socialist rule across the region. Of course, Marxist ideology originally anticipated the “withering away” of law under full communism. However, in socialism, meaning the practice of communism, law was “reduced to a tool of political expediency”.⁵⁰⁹ Law was understood as a tool for achieving socialist policy and so the legal system and the legal professions across CEE lost their independence. Lawyers in socialist countries were viewed as public servants carrying out their duties for the benefit of the public at large.⁵¹⁰

It has been suggested that it is possible to accurately say, at one and the same time, that “there [was] no comprehensive Soviet program of legal aid” and, on the other hand, that “the entire Soviet legal system constitute[ed] a system of legal aid”.⁵¹¹ This is because while Soviet law did not provide for an extensive legal aid system (i.e. there were no extensive provisions governing the position of poor litigants and no provisions related to the establishment or funding of legal aid bureaus), it did not have to. Firstly, legal assistance in socialist countries was incredibly affordable in any event and any person requiring legal services could go the office of a “lawyers collective” where fees, as insignificant as they were, may be forgiven.⁵¹² Secondly, the litigation process was considerably simplified, such that in many cases applicants would be able to represent themselves, with the major workload falling to the inquisitorial

⁵⁰⁷ Ibid., 139.

⁵⁰⁸ Ibid., 144, 145.

⁵⁰⁹ Petrova, “Political and legal limitations,” 543.

⁵¹⁰ Cappelletti and Gordley, “Legal Aid,” 390.

⁵¹¹ Ibid., 389, 390.

⁵¹² Ibid., 390.

judge rather than the lawyers.

A Bulgarian commentator, writing in the late 1970s, summed up the situation as follows:

“In Bulgaria, as in other socialist countries, there is no need for special procedures or mechanisms to reduce the costs of resolving disputes involving small or modest claims. This is because the normal judicial machinery is inexpensive and very accessible to the people”.⁵¹³

Socialist rule had reduced the importance of law and the legal profession by creating a closed society and simplified social conditions.⁵¹⁴

The collapse of the Berlin Wall brought about intense political and economic changes to the countries of Central and Eastern Europe and, of course, did not leave the legal professions unaffected. In the five to ten years after 1989, the responsibility for providing legal assistance to the poor reverted, at least in form, to the pre-war default. That is to say that, with the exception of provisions related to mandatory *ex officio* representation in criminal proceedings and the waiving of administration fees for indigent persons in some civil cases, the onus fell on the national bar organizations to provide for legal assistance to the poor on a charitable basis.⁵¹⁵ Some interesting pro bono models emerged during this period echoing those of earlier periods. For example, in the late 1990s, Citizen’s Advice Bureaus (as discussed above) spread to several Central and Eastern European countries, including Poland (1996) and the Czech Republic (1997).⁵¹⁶ The Polish network of CABs (*Biuro Porad Obywatelskich*, BPO) was explicitly inspired by the English model and aimed to assist citizens through the provision of information and education facilitating community action.⁵¹⁷ The BPO network was established at the initiative of a consortium of major NGOs in Poland who obtained initial funding from a mixture of US, EU, UK and Polish donors and funding schemes.⁵¹⁸ Five CABs were established across Poland between 1996 and 1997 and provided assistance to citizens on matters such as housing, employment, consumer rights, pensions, addiction, neighborhood and

⁵¹³ Cappelletti and Garth, *Access to Justice*, 231.

⁵¹⁴ Szabo, “Socialist conception of law,” 17.

⁵¹⁵ Bárd and Terzieva, “Indigent Criminal Defendants,” 227–37; Rekosh, Buchko, and Terzieva, “Access to Justice,” 7–9.

⁵¹⁶ Bullain and Toftisova, “European Policies and Practices,” 64; Rekosh, Buchko, and Terzieva, “Access to Justice,” 25.

⁵¹⁷ Rekosh, Buchko, and Terzieva, “Access to Justice,” 25; see also: <http://bpo.warszawa.pl/o-nas/> (accessed Sept. 2016).

⁵¹⁸ Including the European Union PHARE Democracy Programme, the Stephen Batory Foundation, the UK Know How Fund, and Polish authorities.

family conflict and more.⁵¹⁹ As in Western Europe, half a century earlier, such organized and charitable pro bono models often presaged state-funded systems, which in Central and Eastern Europe, began to emerge in the early 2000s.

Of course, many of these states had brand new democratic constitutions that were enacted in the early and mid-90s, often largely modelled after Western templates. As in the West, these constitutions all proudly proclaimed the right of equal access to justice and the right to legal representation in judicial and administrative proceedings.⁵²⁰ However, beyond certain situations in the context of criminal defense, these rights placed no positive obligations on the state to actually fund or institutionalize a broad system of legal aid. Consequently, the national bar organizations and various legal volunteers (including law teachers and law students)⁵²¹ took it upon themselves to address the challenge of unmet legal need. This would remain the case until the early 21st Century (to be discussed further in Chapter 5).

If we can draw any conclusions at all from the above, it is that across much of Europe (i.e. Western Europe), the 20th Century saw charitable models and rationales for pro bono recede and the ascendance of models in which lawyers would be compensated by the state. A number of European countries began to embrace the idea of state-guaranteed, state-sponsored and sometimes, even state-organized legal aid. In these new models of “pro bono”, the primary rationale was rooted in social contract theory and the idea that access to justice (defined narrowly) was a civic right guaranteed by the state.

Unsurprisingly, state-funded legal aid echoed the pro bono programs established and run by bars, municipalities, churches, trade unions and the like in the middle ages and the 19th and early 20th centuries. With the emergence of nation states, it was perhaps inevitable that the competence for the provision of pro bono legal services should be transferred upwards. However, there are a few key differences. Firstly, as noted above, and largely thanks to the ideas of philosophers such as Hobbes, Locke and Rousseau, already from the 1600s and 1700s the idea of the state as the protector of the rights of man had emerged. These ideas (in the context of the right to equal access to the law) began to find constitutional form in the 1800s. However, as outlined above, it was not until the mid-20th century, with the emergence of

⁵¹⁹ Ford Foundation, Grant File, Governance and Civil Society Program, Appropriation No. 422 for Governance and Civil Society, Request No. 647, July 9, 1998.

⁵²⁰ Rekosh, Buchko, and Terzieva, “Access to Justice,” 5.

⁵²¹ Ważyńska-Finck, “Poland as Success Story,” 44–56.

modern welfare states, that the guarantees of legal assistance that these ideas required, began to be significantly institutionalized as an integral component of European social states. Social contract theory began, over time, to become the dominant rationale for the guarantee of pro bono (or low bono) legal services to the poor, largely supplanting prior rationales such as charity and professional duty.

Another key difference between the models emerging in the 20th Century and the earlier models, is that with state sponsorship came the expectation, from lawyers providing pro bono services, of being reasonably remunerated by the state. As will be explored further in Chapter 5, this led to the emergence of a specialized “Social Bar” which took it upon itself to work for the poor and needy, leaving other lawyers to shirk their historic professional duty to engage in pro bono work. What is clear though, is that for those lawyers who did remain involved in pro bono work during the emergence of the state-sponsored legal aid systems, access to justice (narrowly defined) remained the dominant objective.

2 Beyond Individual Access to Justice: The Ideological Foundations of Big Law Pro Bono in Europe

As was noted in Chapter 1, in the United States, between the 1970s and the early 2000s, there was a fusion of the pro bono resource (Big Law Pro Bono in particular) with the political agenda to eradicate poverty (in the 1970s) and the growing concerns about access to justice (defined narrowly as civil legal aid) in light of cuts to the federally funded legal aid program. Pressure on Big Law to define the pro bono resource in ways that conceived of it functionally and narrowly, as a solution to the justice gap, came from multiple directions: legal service providers, the organized bar, elite law graduates and the Republican Party. On the contrary, as we shall explore in Chapters 4 and 5, in Europe the situation was altogether different. However, before we can begin to analyze how Big Law Pro Bono has developed in Europe, we must first gain some understanding of the important legal advocacy movements sweeping Europe in the decades prior to the introduction of Big Law Pro Bono, in between the late 1990s and early 2000s.

Accordingly, we shall now take another look at pro bono practice (as defined in Chapter 2) in Europe. However, in the below, we shall explore models that emerged in the mid to late 20th Century and, contrary to those models discussed above, these models transcend narrow concerns with access to justice (defined as the provision of legal assistance to poor individuals, thus enabling them to participate in the existing processes for the administration of justice).

While the actors and organizations engaged in the below described practices typically proclaim their allegiance to conventional legal professional norms, such as neutrality and impartiality, this sometimes appears as somewhat of a ruse, a necessary cover story to earn trust among international audiences. Behind the façade of professional duty (and sometimes charity), these models of pro bono often appear more cause-oriented, more ideological, than much of the pro bono practice that was carried out throughout European history. The recipients and target beneficiaries of pro bono, within these models, are often disadvantaged groups and individuals. However, those individuals that are served, are not defined primarily by their level of income, but by their political affiliation or social status.

The pro bono involves much more law reform oriented research, lobbying and legal and policy advocacy, evidence gathering and fact finding and much less providing information, advice and direct representation to individuals. Such pro bono work is still carried out by lawyers, but often lawyers are not the primary drivers of the work. Moreover, this kind of work is typically led from within the organizational setting of professionalized civil society, rather than from the organized bar, the state or small firms. In terms of objectives, this kind of work seems oriented more toward the wide definition of access to justice (explored in Chapter 2), or what Cummings refers to as the “policy” dimension of public interest law.⁵²² This is to say that it is concerned primarily with achieving norm change. It is concerned with making the processes and outcomes of the legal system more just, fair and equitable. It is concerned with addressing systemic or structural defects in the administration of justice that prevent the conflict resolution, rulemaking or rule enforcement processes from treating certain individuals or groups fairly and from delivering justice to such individuals and/or groups.

⁵²² Cummings, “Pursuit of Legal Rights,” 523.

2.1 The civil liberties and international human rights movements in Europe

Across Europe, during the 20th century, a model of legal activism, which might be referred to as the “civil liberties pressure group” (seeking to apply pressure on domestic governments to better protect civil liberties) took shape. At least since the abolitionist movement – in which lawyers played a very important role – launched in 1787 with the founding of the Society for Effecting the Abolition of the Slave Trade, England, in particular, has had a long and rich history of organizational legal advocacy of this kind.⁵²³ One of the oldest and longest running of such advocacy organizations in Europe is the National Council for Civil Liberties (NCCL, subsequently renamed Liberty), based in London. Liberty was founded in 1934 in a context of growing concern on the political left in Britain about police brutality towards left-leaning political protesters and a rising tide of Fascist activity in Germany and in Britain.⁵²⁴ The work of Liberty inspired the founding of other such national civil liberties pressure groups in the UK, such as JUSTICE and would ultimately inspire the founding of Amnesty International. The work of Amnesty International, with the emergence of the international human rights movement in the 1970s, would inspire a second model of legal advocacy, embraced by dozens of human rights pressure groups across Europe. In many respects, Amnesty International would carry on the tradition of this earlier form of legal activism pioneered by the likes of Liberty.

With the birth of the international human rights movement in the 1970s and 1980s, the thriving of organizations like Amnesty International and Human Rights Watch and the flourishing of international and regional human rights jurisdictions, we have witnessed an explosion of NGOs globally. Such NGOs are active at both the national and international level and have embraced a wide variety of legal advocacy strategies engaging lawyers in interesting and novel ways.

At the national level, watershed moments in Europe came with the signing of the Helsinki Accords in 1975 by 35 states (32 of which were European) and the fall of the Berlin Wall in 1989. The Accords, which incorporated the key UN human rights instruments by reference (i.e. the UN Declaration and the Covenant of Civil and Political Rights), required respect for human rights and fundamental freedoms, including *the freedom of thought, conscience, religion or belief*. Accordingly, they were of much significance in Central and Eastern Europe, much of

⁵²³ See, generally, Harlow and Rawlings, *Pressure through Law*, and Keck and Sikkink, *Activists beyond Borders*, 39–78.

⁵²⁴ Clark, “Sincere and Reasonable Men?” 513–37.

which was under Soviet rule with limited scope for civil and political rights. However, the Accords were not a treaty and so not subject to ratification and could not become legally binding. Nevertheless, the Accords “recognized and legitimized concern for human rights in the signatory states”.⁵²⁵ In so doing, they led to the establishment of many “Helsinki Groups” (organizations seeking to monitor signatory states and hold them accountable to international human rights standards) and other human rights organizations such as the Moscow Helsinki Group (founded in 1976), the Irish Council for Civil Liberties (1976), the Norwegian Helsinki Committee (1977), the Swedish Helsinki Committee for Human Rights (1982), the Polish Helsinki Committee (1982) and so on, across much of Central and Eastern Europe. Many of these organization were inspired into existence by the American Helsinki Watch (founded in 1978, later Human Rights Watch) following a 1982 meeting it convened in Italy intending to encourage European organizations to establish and apply political pressure vis-à-vis human rights on the socialist governments of CEE.⁵²⁶

Although ostensibly concerned with human rights, many of the CEE-based organizations were formerly dissident groups concerned with national liberation from Soviet rule.⁵²⁷ Following the fall of the Berlin Wall, they were able to go “above ground”, openly embracing the “Helsinki” movement and becoming increasingly legal in orientation. As such, they were primed to take advantage of the flood of US funding during the 1990s and early 2000s in particular from the Ford Foundation and the Open Society Foundations (to be discussed below) promoting public interest law across the region. Indeed, in addition to the other Helsinki groups across CEE, other similar organizations emerged all across CEE throughout the 1990s, organizations such as the Slovakian Milan Simecka Foundation (1991), Ecojuris Institute of Environmental Law (1991), the Glasnost Defense Foundation (1991), the Polish Women’s Rights Centre (1994), the Czech Legal Resources Centre (1996), the Hungarian Human Rights Information and Documentation Centre (1997), the Hungarian Legal Defense Bureau for National and Ethnic Minorities (1997) and the Hungarian Civil Liberties Union (1999). The Polish Helsinki Committee, being one of the pioneers among this group of NGOs, often worked alongside US donors, and played a key role in building the regional human rights movement and getting such organizations off the ground.

⁵²⁵ Neier, *International Human Rights Movement*, 145.

⁵²⁶ *Ibid.*, 212.

⁵²⁷ *Ibid.*, 145, 146.

In the following sub-sections, I will explore these various types of advocacy organizations and practices both in terms of their rationales and objectives and in terms of the types of work carried out and the roles played by lawyers. This is important as this will help us to understand, in subsequent chapters, the model of Big Law Pro Bono that has emerged across Europe.

2.1.1 Rationales for and objectives of legal activism during the civil liberties and international human rights movements in Europe

As suggested just above, although many of these organizations talk of their work in neutral and apolitical terms and proclaim that they are acting out of a sense of professional duty or charity, these models of pro bono often appear more cause-oriented, more ideological, than much of the pro bono practice that was carried out previously throughout European history.

Indeed, Amnesty was founded in 1961 by Peter Benenson, an Oxford educated barrister who, incidentally, was also the founder of JUSTICE in 1957. On founding JUSTICE, Benenson was explicit that he wanted the organization to have nothing to do with the NCCL, which was widely perceived to be a communist front organization in the 1950s.⁵²⁸ Amnesty was to follow in the footsteps of JUSTICE and was to be nonpolitical. In the words of Benenson in the first ever Amnesty newsletter:

"We have not the slightest intention of dabbling in the domestic affairs of other nations. We are concerned only with the basic human rights of any man or woman to give visual or vocal expression to sincerely held beliefs. But when this right is infringed, we shall strive to mobilize world opinion to the point where it can no longer be flouted by the abusers of political and religious liberty."⁵²⁹

At its founding, Amnesty's focus was exclusively on the issue of prisoners of conscience. Beyond this, the organization was to be internationalist, impartial and objective, bearing witness to human suffering. This was of course also a requirement for an organization seeking international credibility in the Cold-War context of the 1960s. As Benenson made clear in the newsletter quoted above, the key advocacy aim of Amnesty was to mobilize public opinion in the support of its campaigns, concerned with the violation by states of civil and political rights,

⁵²⁸ Moores, "Progressive professionals," 542–43.

⁵²⁹ Hopgood, *Keepers of the Flame*, 24.

in the hope of achieving a behavioral change on the part of governments (in the form of releasing prisoners of conscience) and the public at large (in the form of donations to support the families of prisoners). This was achieved in two ways: firstly, members, the world over (there being some 550 Amnesty volunteer groups in 18 countries by 1967), were to voice their support for particular issues so as to raise awareness and funds (for example by adopting political prisoners and writing letters of appeal); and secondly, the attention of the media was to be focused on these issues (through articles published by journalists in leading national newspapers), i.e. “naming and shaming”.⁵³⁰

Meanwhile, the Polish Helsinki Committee was formed in 1982 as an underground volunteer organization under martial law and engaged in the monitoring and documenting of human rights abuses under the Jaruzelski regime. Being inspired by Helsinki Watch, it initially embraced many of the familiar advocacy strategies adopted by Human Rights Watch, i.e. combining law, journalism and political lobbying. The PHC began receiving funding from the Ford Foundation (amongst other foundations) in 1991 and was a relatively large organization with a budget of over \$1 million annually (nearly 2/3 of which received from Ford during some years). Its mission, as described in a 1996 donor report to Ford was to:

“[Move] beyond protest...and create a lasting institutional framework for human rights protection through constitutional and legislative reform, monitoring state actions to ensure compliance with domestic and international commitments and [broaden]...public understanding of and commitment to human rights.”⁵³¹

In terms of rationale then, these human rights organizations and civil liberties organizations speak in terms of moving “beyond protest”, in terms of neutrality and impartiality. They talk in terms of protecting “basic human rights” and “compliance with domestic and international commitments”. Ostensibly, these are apolitical rationales. However, such rationales often have leftist, activist and dissident origins. Moreover, the slippage within human rights discourse and practice, between claims to universalism, neutrality and impartiality on the one hand and

⁵³⁰ Dezalay and Garth, “Cold War to Kosovo,” 236.

⁵³¹ Ford Foundation, Grant File, Eastern Europe Overseas Program, Appropriation No. 27J for Eastern Europe, Overseas, Request No. 378, May 23, 1996.

politicization and even Manichaeism, on the other, is well documented.⁵³² The words of a former Amnesty International employee, interviewed by Steven Hopgood, are illustrative:

“You can’t be profoundly neutral in issues of life and death. You just can’t. You’ve gotta choose life. If you’re gonna save people, you know, be on the side of life or the side of death. We used to call it in [country deleted] the area between good and evil. You’re either with god or with the devil. And President [name deleted] is the devil. So you choose where you are. You can’t stand and say, I don’t choose any side. You’ve got to be on a side.”⁵³³

From this vantage point, we might suggest that narratives of neutrality and impartiality, are either rejected at certain points of time or they are being deployed strategically and selectively, for example, to win favor with international donors, journalists and politicians. Domestically however, within the national political context in which such organizations are targeting their campaigns for norm change, the actions of these actors will often be construed politically, as unwanted foreign interference.

In terms of objectives, such organizations are primarily interested in norm change rather than access to judicial and administrative processes. Like Nelson Mandela, referred to in Chapter 2 under the wide definition of access to justice, they worry that certain systems of justice, “enable the guilty to drag the innocent before the courts [and] the unjust to prosecute and demand vengeance against the just”.⁵³⁴ Accordingly, they seek to render both the process and outcomes of such systems, more just. They work both within and beyond the existing processes and norms by leveraging the power of international law and international political influence and applying that power domestically.

2.1.2 Roles played by lawyers in the civil liberties and international human rights movements

As suggested above, the work of these types of advocacy organizations typically involves research, lobbying and legal and policy advocacy, evidence gathering and fact finding and is

⁵³² See, generally, Hopgood, *Keepers of the Flame*; and Douzinas, *Human Rights and Empire*.

⁵³³ Hopgood, *Keepers of the Flame*, 106.

⁵³⁴ Mandela, *Struggle is my Life*, 139.

not primarily focused on advice and direct representation as was the case with models of pro bono lawyering explored in Section 1, above.

Organizations such as the NCCL, like the ACLU or the NAACP in the US, typically did not start out as lawyers' organizations. Indeed the NCCL was founded by a combination of lawyers, journalists, politicians and writers.⁵³⁵ The activities of Liberty were (and are), broadly, fourfold: research in tandem with parliamentary lobbying for legislative reform or opposition to such reform; use of the media for the mobilization of public opinion against repressive state practices; the provision of legal services and information to those in need (especially those at the receiving end of repressive state practices); and strategic, test case or impact litigation. Despite this considerably law-oriented mandate, the NCCL did not have an in-house legal team until the mid-seventies and consequently, collaboration with volunteer barristers and solicitors was (and is) central to their legal service work (i.e. "case-work"). In 1969, the NCCL had as many as 60 qualified legal volunteers assisting with the organization's case docket.⁵³⁶ Beyond this, the NCCL often collaborated with law centers (discussed above) sharing information and referring clients.⁵³⁷

As for Amnesty, in order to establish credibility with journalists which was essential to Amnesty's fact-based naming and shaming advocacy model (discussed in more detail below), it was crucial that the organization retained as neutral a stance as possible and was as informed as possible. This meant that a huge part of Amnesty's advocacy was research (both desk-based and in the field). This is where lawyers (both volunteer and on-staff) have played a central role. Firstly, volunteer lawyers (alongside volunteer doctors) have played an important part in documenting human rights violations by visiting victims of torture and prisoners of conscience.⁵³⁸ Secondly, with the maturation of the human rights movement, Amnesty's work has begun to embrace more hard-law techniques, and lawyers, both on-staff and working on a pro bono basis, have played a key role in developing and implementing legal advocacy strategies, including both law reform work and strategic litigation. Notably, however, litigation was not a key component of Amnesty's advocacy strategy in the early days. Certainly, in its early decades, Amnesty was never primarily a litigation or even a law reform oriented

⁵³⁵ Clark, "Sincere and Reasonable Men?" 516–17.

⁵³⁶ Moores, "Progressive professionals," 548.

⁵³⁷ Cohen and Staunton, "In pursuit of a legal strategy," 306–07.

⁵³⁸ Power, *Amnesty International*, 28; Reoch, "Community of Conscience," 183.

organization and indeed Peter Benenson (Amnesty's founder) was explicitly trying to avoid creating a lawyer-dominated organization.⁵³⁹ Nevertheless, in spite of this somewhat anti-legal orientation, it is undeniable that lawyers have played a key role in the work of Amnesty throughout its history and pioneered a model of legal activism that would spread across Europe and across the entire globe.

A brief exploration of the Polish Helsinki Committee (PHC) will be illustrative of the types of work carried out by the many human rights advocacy organizations founded in CEE between the 1980s and 1990s (referred to above) and the roles that lawyers have played in their work. A review of early grant files from the Ford Foundation related to the PHC reveals that the human rights-oriented mission of the PHC was carried out through a diverse range of activities including: providing human rights education (to Polish judges, lawyers, journalists, doctors and prison officials); promoting legislative reform and monitoring state compliance; publishing reports on human rights issues in Poland; producing journalistic output on the same; undertaking public outreach with respect to human rights; and submitting amicus briefs in Polish court proceedings.⁵⁴⁰ The work, in many respects, overlaps with the work of the NCCL described above, although strongly flavored by international and European human rights law and the new advocacy options and opportunities this introduced at the domestic level. And much like the NCCL, in all of its work, the PHC relied extensively on lawyers both on-staff, working pro bono, and law students undertaking internships.⁵⁴¹

If the objective of “cause lawyering” is described in terms of “challeng[ing] prevailing distributions of political, social, economic, and/or legal values and resources”⁵⁴² or “altering some aspect of the social, economic and political status quo”⁵⁴³, whereas “conventional lawyering” is defined by the provision of legal services on a case-by-case, transaction-by-transaction basis, with the only ideological commitment being towards the ideology of advocacy, professionalism and technical competence, then we must conclude that lawyers in the civil liberties and human rights movement were cause lawyers above all.

⁵³⁹ Hopgood, *Keepers of the Flame*, 55.

⁵⁴⁰ Ford Foundation, Grant File, Eastern Europe Overseas Program, Appropriation No. 27J for Eastern Europe, Overseas, Request No. 378, May 23, 1996.

⁵⁴¹ Ford Foundation, Grant File, Grant No. 980-1619, Helsinki Foundation for Human Rights Report, July 1, 1998 to June 30, 2000, 45–50, 61–66 and appendix.

⁵⁴² Sarat and Scheingold, *Cause Lawyering and the State*, 13.

⁵⁴³ Sarat and Scheingold, *Cause Lawyering*, 4.

2.2 The European public interest law movement

Towards the end of the 20th Century, another progressive legal advocacy movement emerged in Europe (mainly unfolding in Central and Eastern Europe). This movement was American-led and inspired directly by the US public interest law movement of the 1960s and 1970s. Given how important this movement is to the subsequent development of Big Law Pro Bono in Europe, I will take quite some time to explore its emergence, rationales, objectives, practices.

Commencing in the 1990s, in the wake of the collapse of the soviet system, Europe bore witness to the construction, largely by US funding organizations and US donor-backed NGOs, of a *European public interest law field*, i.e. a number of organizations, institutions professionals and academics, loosely defining themselves as a community, deploying common tools and embracing overlapping objectives.

Far from being the disorganized efforts of a few dispersed individuals, this construction project was a coordinated and coherent effort to radically alter legal culture in Central and Eastern Europe. The explicit goals of this project, in the words of the founders, were to “[bring] about a change in legal culture and mentality which [would] encourage citizens to consider the law as an instrument to protect their rights and pursue their interests”⁵⁴⁴; “to develop public interest law as a new field of law work”; and “to promote a regional community of public interest law organizations”⁵⁴⁵. Far from a flash in the pan, this construction project was a broad, collaborative and consistent effort to develop and institutionalize a particular set of law-related organizations, practices and beliefs that would, the architects hoped, completely change the relationship between law and society in CEE. These objectives are strikingly similar to the objectives of the US public interest law movement. This should probably not come as a surprise given that the Ford Foundation played a central role in both movements. The project targeted civil society, the private bar (although *not* Big Law), academia and the public sector.

The architects carried out the project to construct the public interest law field chiefly by funding, promoting and seeking to institutionalize four core forms of legal practice:

⁵⁴⁴ COLPI Newsletter, vol. 1, no. 1, June 1998, introduction (on file with author).

⁵⁴⁵ McClymont and Golub, *Many Roads to Justice*, 233.

- Public interest lawyering within civil society (including impact/strategic litigation, political lobbying, community and media outreach, all carried out by NGOs);
- Clinical legal education within universities (via the establishment of university law clinics); and
- Legal aid within the public sector (i.e. increased access to justice for the legally needy, to be provided by government actors).

To be sure, other practices falling under the public interest law umbrella were promoted. However, the three listed above, together, form the central thrust of the effort to institutionalize public interest law practice in CEE between the mid 1990s and the dawn of the 21st Century.

2.2.1 Rationales for and objectives of legal activism during the public interest law movement in Europe

As noted just above, the movement was a coordinated and systematic effort to radically alter legal culture in Central and Eastern Europe. On this basis alone, we can conclude that the architects of the movement were interested in achieving norm change. However, more important for our purposes is to take note of the model of legal advocacy that was privileged and promoted within the movement, which, as we shall see, consisted of a “professionalized dissent”. That is to say, it consisted in taking the ideological and dissident activism that had existed across the region under Soviet rule and professionalizing and institutionalizing it so that it could operate within the new democracies and take advantage of newly minted progressive constitutions. the objective being to promote various social and political causes within the new framework of institutionalized politics.

It was not until 1995 that US funders began to seriously consider the possibility of significantly investing in the construction of a public interest law field in CEE. The relevant organizations in 1995 were primarily the Ford Foundation and the Open Society Institute (or Soros Foundations more broadly). Other foundations also played a role, such as the American Bar Association Central and European (later Eurasian) Law Initiative (“ABA CEELI”), Mott Foundation, the MacArthur Foundation, the German Marshall Fund and the Rockefeller Foundation.

These organizations had been engaged in the promotion of democracy and the rule of law (including human rights) in CEE since the fall of the Berlin wall in 1989. Consequent upon these pre-existing law reform efforts, both Open Society and ABA had established purpose-built organizations entrusted with executing their regional law reform projects. In the case of the Open Society, that was the Constitutional and Legislative Policy Institute (COLPI), which had been founded in Budapest by Professor Andras Sajo, a leading constitutional law professor, in 1991. George Soros had been traveling a great deal in the wake of the political turmoil of 1989 and had been getting many requests from political leaders of the new independent states to provide support with constitution drafting. Soros accordingly tasked Sajo with setting up an organization to serve that purpose.⁵⁴⁶ Hence, the original aims of COLPI were “to assist the CEE/FSU [former Soviet Union] countries with constitution drafting and constitutional reforms”.⁵⁴⁷ Meanwhile, in the case of the ABA, the relevant organization was ABA CEELI. ABA CEELI had been founded in 1990 with the aspiration of helping CEE countries to establish the rule of law by facilitating constitution drafting.⁵⁴⁸

As for the Ford Foundation, it had been funding activities aimed at “improving the US understanding of the Soviet Union and Eastern Europe” and promoting “freedom of expression, cultural pluralism and human rights” since the early 1950s, spending around \$60 million in the period up to 1989 (more than 300 hundred million today).⁵⁴⁹ From 1989 onwards, the Foundation expanded its efforts and embraced a strategy of directly supporting indigenous organizations rather than Western intermediaries.⁵⁵⁰ Subsequently, in 1991, the “Russia and Eastern Europe Program” was established and had the stated aims of promoting economic reforms, reform of political and legal institutions, promoting “the integration of international human rights standards in domestic law and practice” and strengthening institutions of higher education.⁵⁵¹

As it happened, in 1995, COLPI came under new leadership (Stephen Holmes, a Yale law graduate and now a Professor at NYU Law School) and took on a new name and new mission.

⁵⁴⁶ Interview number 46, June 22, 2016.

⁵⁴⁷ Email from Zaza Namoradze, Director of Open Society Justice Initiative Budapest Office (on file with author, May 10, 2015).

⁵⁴⁸ Silkenat, “American Bar Association,” 747.

⁵⁴⁹ Ford Foundation Records, Peace and Social Justice Program, Governance and Civil Society, Deputy Director Office Files of Urvashi Vaid (FA592), Series IV: Russian and Eastern Europe, Folder: Russia and Eastern Europe Program. “Program Priorities and Office Structure” (report) (1994–1996).

⁵⁵⁰ Ibid.

⁵⁵¹ Deruga, “Hegemony needs Society,” 33.

The Constitutional and Legal (rather than legislative) Policy Institute was now mandated with effecting broad scale legal reform (particularly in relation to legal education and human rights) in Russia and Eastern Europe, thus bringing its aims in closer alignment with the Ford Foundation.⁵⁵²

Crucially, at some point in 1995, Joseph Schull (Ford's director for the Russia and Eastern Europe program at the time) had come to the conclusion that "a focused PIL [public interest law] grant-making program was both needed and possible".⁵⁵³ Schull recalls that, since the beginning of the 1990s, Ford had funding relationships with a number of human rights organizations in Central and Eastern Europe and (Ford) was keen to pursue a bottom-up approach to securing societal change in the region. These were organizations that had emerged as dissident groups and reinvented themselves as human rights organizations as a result of the global human rights movement (discussed just above) and the Helsinki accords.⁵⁵⁴ Schull explains that while these organizations often had persons of high moral integrity, they "often...were not very skillful at dealing with public institutions because they had spent most of their careers doing battle with them".⁵⁵⁵ Schull believed that there must be a "hybrid" approach, a form of "professionalized dissent", that while departing from a civil society perspective, recognized that in order to secure societal change, you needed to engage with public institutions.⁵⁵⁶ Public interest law could be a vehicle enabling Ford to work with civil society but by channeling their efforts and "principled views" into legal reform work (targeted at universities, bar associations, courts and the state) that could secure lasting and sustainable institutional change.

So it was that in late 1995, apparently by coincidence, over the same weekend in November, COLPI and the Ford Foundation hosted two separate conferences in Budapest and Warsaw respectively.⁵⁵⁷ These conferences brought together various civil society actors from CEE and

⁵⁵² Email from Zaza Namoradze, Director of Open Society Justice Initiative Budapest Office (on file with author, May 10, 2015).

⁵⁵³ McClymont and Golub, *Many Roads to Justice*, 234.

⁵⁵⁴ Interview number 51, Aug. 31, 2016.

⁵⁵⁵ *Ibid.*

⁵⁵⁶ *Ibid.*

⁵⁵⁷ The Ford Foundation sponsored conference was entitled "An International Symposium on Public Interest Law Actions" and was co-organized with the Polish Helsinki Foundation for Human Rights. Meanwhile, the Open Society sponsored conference was organized by COLPI in collaboration with the International Helsinki Federation based in Vienna, the EU PHARE Programme (the Programme of Community aid to the countries of Central and Eastern Europe), and the International Human Rights Law Group based in Washington DC. See

representatives from the funding organizations in order to consider the possibility of using public interest law strategies to promote progressive agendas in the region. The conferences marked the beginning of a “heavy investment” in public interest law promotion in CEE.⁵⁵⁸

Initially the funders were still timid, unsure of the terrain and operating with caution. There was a concern within the Ford Foundation that public interest law was too foreign an idea to take root in CEE.⁵⁵⁹ Consequently, the Ford Foundation enlisted the Polish Helsinki Foundation for Human Rights to organize the conference and test the idea of public interest law among a small group of civil society actors. Schull recalls that:

“There was such a consensus that we did not want to be cultural imperialists... You have to be aware that just saying that you don’t want to export models inappropriately doesn’t mean you aren’t doing it. The main strategy we adopted for trying to avoid inadvertently implanting alien ideals in soil that was not fertile was to focus on funding local, indigenous organizations and support them to run their own projects, projects that they wanted to run.”

The agendas of both conferences include items such as “strategies for co-operation between lawyers and NGOs”, “guidelines for selecting cases” and “lobbying government and parliament”, and clearly envisioned and sought to promote the legal mobilization of civil society actors within the region.⁵⁶⁰

Ford Foundation employees left the conference satisfied that public interest law was a “relevant framework for advocacy in the region” which thus allowed Ford to move ahead with its plans.⁵⁶¹ Schull, perceiving the overlapping objectives of the Open Society in the region, decided to try and steer the Open Society towards embracing “public interest law” as a shared umbrella term to give coherence to the activities of both foundations. Schull recalls:

Rekosh, “Constructing Public Interest Law,” 75; and OSCE, Office for Democratic Institutions and Human Rights, Bulletin, vol. 4, no. 2 (Spring, 1996): 41.

⁵⁵⁸ Ibid.

⁵⁵⁹ McClymont and Golub, *Many Roads to Justice*, 240.

⁵⁶⁰ Ibid.

⁵⁶¹ Ibid.

“We wanted more bang for our buck... Foundations chronically set enormous objectives for themselves: *‘to end poverty as we know it and support that with a 500,000 dollar grant program that ends in three years’*... We were aware that it was a big undertaking [i.e. constructing a public interest law field in CEE]...and would require many hands on deck and many sources of funding. We wanted [the Open Society] to feel that it was their program rather than our program.”⁵⁶²

Accordingly, Schull reached out to the Open Society and suggested the joint organization (between COLPI and the Ford Foundation) of a follow-up conference at Oxford University in July 1996. Open Society agreeing to the proposal, this conference was more boldly entitled the “Symposium on Public Interest Law in Eastern Europe and Russia”.⁵⁶³ The symposium brought together leaders from NGOs in Russia and Eastern Europe in fields such as human rights, women’s rights, consumer rights and environmental advocacy, as well as law professors, lawyers and judges from the region and American and Western European NGO and donor representatives and other legal experts.⁵⁶⁴

The objectives of the symposium were:

“[...]

1. To promote public interest law as an important field of activity and foster future networking and other field-building activities;
2. To provide an opportunity for the exchange of experience and knowledge across national borders among public interest law practitioners;
3. To discuss methods and approaches that will enhance the capacity of participating organizations;
4. To identify obstacles to the development of public interest law in Eastern Europe and Russia as well as potential responses.”⁵⁶⁵

⁵⁶² Interview number 51, Aug. 31, 2016.

⁵⁶³ Symposium on Public Interest Law in Eastern Europe and Russia, Report, sponsored by the Ford Foundation, New York and COLPI, Budapest, July 15–20, 1996, Queen Elizabeth House, Oxford, UK.

⁵⁶⁴ Ibid. 1.

⁵⁶⁵ Ibid.

The symposium was also to serve as “an occasion to shape future funding agendas in the public interest law field” following interaction with local practitioners.⁵⁶⁶ Schull recalls that the funders were trying to educate themselves as to what the best funding strategy would be.

In terms of the objective of bringing Open Society on board, the conference was a success and Zaza Namoradze (the Deputy Director of the Open Society Institute’s Constitutional and Legal Policy Institute) recalls that the conference was a watershed moment for Open Society, and the foundation would go on to be a huge supporter of efforts aimed at promoting clinical legal education and state-sponsored legal aid in CEE.⁵⁶⁷ By 1996 then, both Open Society (via COLPI) and the Ford Foundation were explicitly thinking in terms of *constructing a public interest law field* in Russia and Eastern Europe.

All of the actors in the effort to construct the public interest law field in CEE were fully aware of the scale and complexity of the task they had undertaken. Dimitrina Petrova, (at the time a Bulgarian law Professor who founded the European Roma Rights Centre together with Open Society in 1996) writing in a paper for the Oxford symposium, describes the larger project as one of “transplanting Western public interest law into Eastern European soil”.⁵⁶⁸ In her paper, entitled “Political and legal limitations to the development of public interest law in post-Communist societies”, Petrova describes a number of significant obstacles to implementing the project, including restricted access to the courts, limited direct application by the judiciary of state constitutions and international law, limited human resources, poor legal infrastructure, limited rights to legal aid and the dominating Soviet-era vision of law as an instrument of the state.⁵⁶⁹ Meanwhile the symposium report records concerns from participants about “a culture that is not conducive to public interest law”.⁵⁷⁰ Undeterred however, the conference participants set out a broad agenda for change including:

- Changing the legal culture via “(1) seminars and workshops, and publications that target judges and legal professionals, the police, the media and the public; (2) increasing

⁵⁶⁶ Ibid.

⁵⁶⁷ Interview number 46, June 22, 2016.

⁵⁶⁸ Petrova, “Political and legal limitations,” 541.

⁵⁶⁹ Ibid., 543–62.

⁵⁷⁰ Symposium on Public Interest Law in Eastern Europe and Russia, Report (Oxford), 6.

media attention to public interest law; and (3) fostering public discussion and debate about public interest law”.⁵⁷¹

- Changing the legal system via “strategic litigation as well as advocacy for legislative reform and, in some cases, constitutional reform”.⁵⁷² and
- Growing the role of civil society in public interest law activities via “national and international networking of NGOs, fostering closer relationships between NGOs and bar associations and developing lawyer networks, as well as by building bridges to the state.”⁵⁷³

In June 1997, COLPI and the Ford Foundation held another, larger, follow-up conference, this time in Durban, South Africa. The conference was once again entitled “Symposium on Public Interest Law In Eastern Europe and Russia”.⁵⁷⁴ The location was symbolic given the Ford Foundation’s experience in building a public interest law field in South Africa in the 1970s and 1980s (which had also been an inspiration for Schull when launching the PIL funding stream) and it was also hoped that the growing Eastern European public interest law community could learn from their counterparts in South Africa.⁵⁷⁵ The goal was to continue expanding the Eastern European public interest law field. (The organizers had explicitly sought to invite a different range of NGO representatives to those who attended the Oxford symposium.)

While early funding strategies had been reactive, responding to the needs of the emerging regional public interest law community (i.e. local NGO actors), by the late 1990s the US funders began to feel more confident and started to take a proactive *institution-building* approach.⁵⁷⁶ For Open Society, this more pro-active approach was launched when, in 1998, COLPI changed leadership again, with Arie Bloed (a Dutch international law professor who had worked extensively in the field of national minorities), taking over from Stephen Holmes. The first official COLPI newsletter from summer 1998 records that with new management came new focus; COLPI was now to “strive at supporting infrastructure projects rather than one-time events [because there] are too many international conferences and seminars which

⁵⁷¹ Ibid. 7.

⁵⁷² Ibid.

⁵⁷³ Ibid.

⁵⁷⁴ Symposium on Public Interest Law in Eastern Europe and Russia, Report, sponsored by the Ford Foundation, New York and COLPI, Budapest, June 29 – July 8, 1997, University of Natal, Durban, South Africa.

⁵⁷⁵ Ibid., preface.

⁵⁷⁶ Ibid. 244.

end without concrete results”.⁵⁷⁷ Similarly, the Ford Foundation (writing in 2000) described its operating philosophy as “a long-term institution-building approach that could support grantee organizations as they evolved and became more independent, and could encourage grantee sustainability”.⁵⁷⁸ The two foundations (Open Society and Ford Foundation) were clearly collaborating now and viewed the construction project as a dual effort to such an extent that they even began to co-fund a number of NGOs.⁵⁷⁹

Ultimately, this was a sophisticated institution-building effort that involved lobbying of European legal elites and government bodies, extensive and collaborative grant making, and the building of a large community of individuals spanning much of the European continent and all dedicated to the vision of the architects. This vision revolved around embracing the political and ideological activism pursued by the growing number of human rights groups in Central and Eastern Europe and making it more legalistic, professionalizing it and institutionalizing it, to create a hybrid form of “professionalized dissent”.⁵⁸⁰ Put another way, law was to be weaponized as a form of politics, deployed to liberate disadvantaged groups and political and social pariahs from the tyranny of oppressive - or simply ‘backwards’ - regimes.

Although the efforts of the European public interest law movement also focused on more conservative and conventional models of pro bono and legal activism (i.e. state-funded legal aid - as will be explored more in Chapter 5), it was largely oriented towards taking a model of social justice lawyering that had been developed in the United States and “transplanting it into Eastern European Soil”.⁵⁸¹ In this model of legal activism, the rationale is not charity, professional duty or even social contract theory. Rather, the rationale is oriented around one or other ideological cause (Roma rights, women’s rights, environmental justice, etc.) or simply the ideology of international human rights itself.

The objective was not to promote a narrow conception of access to justice, rather it was to promote norm change, meaning “a change in legal culture and mentality”,⁵⁸² such that law came to be seen and embraced as a tool for “bringing about progressive change”.⁵⁸³ However,

⁵⁷⁷ COLPI Newsletter, vol. 1, no. 1, June 1998, introduction (on file with author).

⁵⁷⁸ McClymont and Golub, *Many Roads to Justice*, 235.

⁵⁷⁹ *Ibid.*, 241.

⁵⁸⁰ Interview number 51, Aug. 31, 2016.

⁵⁸¹ Petrova, “Political and legal limitations,” 541.

⁵⁸² COLPI Newsletter, vol. 1, no. 1, June 1998, introduction (on file with author).

⁵⁸³ Interights, *Protecting Human Rights*, 12.

this also implied norm change in terms of progressive “legislative and constitutional reform”.⁵⁸⁴ This was a significant departure from the models of pro bono lawyering that had been practiced in Europe historically (explored above, in Section 1). Although some of the providers/actors were the same (lawyers, law professors, civil society), the recipients differed (disadvantaged and underrepresented groups, political and social pariahs rather than low-income individuals) and the types of work differed, (strategic litigation, law reform, lobbying, monitoring and fact finding, research).

2.2.2 Roles played by pro bono lawyers in the civil liberties and international human rights movements

The role played by lawyers within the European public interest law movement is, in various ways, to feed into sophisticated transnational law reform efforts pursued by professionalized civil society actors, where such law reform is pursued via lobbying and/or litigation. Types of work, therefore, might include comparative legal research, preparing policy papers and amicus briefs and engaging in strategic litigation campaigns.

With their new objective, of creating a European public interest law field, the foundations began to prioritize funding a new model of European non-profit: the “public interest law firm” (“PILF”). This was the very same model of non-profit that Ford had been funding in the 1970s, during the US public interest law movement. As noted in Chapter 1, the original aims of the US public interest law movement had been to leverage the US federal courts, prepared to use broad powers of judicial review, to outmaneuver rogue and non-compliant state and local lawmakers and enforcers who practiced an institutionalized politics of organized racial violence.⁵⁸⁵ The European PILFs were deploying the very same strategy, although fused with models of advocacy from the human rights movement (naming and shaming), using international legal norms to apply pressure on non-compliant national administrations.

The NGOs that the foundations were funding were often the very same non-profits that had been set up during the human rights movement through the 80s and 90s and with which the funders already had longstanding relationships via their democratization efforts during that

⁵⁸⁴ Email from Zaza Namoradze, Director of Open Society Justice Initiative Budapest Office (on file with author, May 10, 2015).

⁵⁸⁵ Cover, “Origins of judicial activism,” 1303–08.

time (e.g. the Polish Helsinki Foundation), but also included new organizations such as the Czech Legal Resources Centre, the Hungarian Human Rights Information and Documentation Centre, the Hungarian Legal Defense Bureau for National and Ethnic Minorities and the Hungarian Civil Liberties Union (all mentioned above). However, now, the funding objectives (and as such the activities that were being funded) were much more law reform oriented.

The emergence of the Council of Europe European Convention (ECHR) and Court of Human Rights (ECtHR) had enabled NGOs to leverage on international norms in order to apply political and (albeit limited) legal pressure on national governments who were signatories to the ECHR. Indeed, by 2011, NGOs were directly involved (either formally or informally) in some 21.5% of cases before the ECtHR.⁵⁸⁶ The possibility to take cases to the ECtHR had thus opened up yet further models of legal advocacy in Europe.

In addition to the domestic PILFs, there were also transnational PILFs emerging. They were oriented towards what might be called “transnational [human rights] public interest lawyering”. Transnational PILFs, such as INTERRIGHTS (1982), the Kurdish Human Rights Project (1992), the Advice on Individual Rights in Europe (AIRE) Centre (1993), the European Roma Rights Centre (1996), Stichting Russian Justice Initiative (2001), Mental Disability Advocacy Centre (2002), European Human Rights Advocacy Centre (2003) and the Equal Rights Trust (2007), had a significant impact on legal advocacy and on public interest law practice in Europe.⁵⁸⁷ These organizations specialized in taking cases to the ECtHR and European Court of Justice from different parts of Europe and lobbying the European institutions and member states to promote their respective advocacy agendas. Typically, such non-profits worked closely with a range of domestic NGOs (domestic PILFs and human rights organizations) who could supply them with promising cases and assist them with monitoring the human rights situation on the ground in places like Chechnya and Kurdistan. The transnational PILFs then supported the domestic NGOs to make powerful and compelling human rights arguments before domestic courts and, once cases had exhausted the relevant domestic proceedings, provided extensive support (or litigated themselves) in cases before Europe’s higher courts. It has been suggested that such NGOs have become “crucial actors that might bridge the gap between local

⁵⁸⁶ Hodson, *NGOs*, 47–49.

⁵⁸⁷ Key funders of these organizations have been the Open Society Foundations, the Ford Foundation, the MacArthur Foundation, the Oak Foundation, the Joseph Rowntree Foundation, and the Dutch, British, and Swedish governments.

grievances and international legal mechanisms" that would fail, of their own accord, to filter down to the local level.⁵⁸⁸

A very brief look at two iconic European PILFs (both funded by Ford and Open Society) will provide insight into how such organizations operate and how they make use of law and lawyers. The now defunct INTERIGHTS (or the International Centre for the Protection of Human Rights), was founded in London in 1982. Its founder, Barrister Anthony Lester (now Lord Lester of Herne Hill QC), was educated at Cambridge University and Harvard Law School. Following a period of time working for Amnesty International in the American South in the 60s, Lester joined the Bar in 1976 where he argued many important human rights cases before the English, European and Commonwealth courts, including arguing the first English case before the ECtHR.⁵⁸⁹ Commenting on his founding of INTERIGHTS, Lester notes:

"My vision for INTERIGHTS grew out of my experiences in the 1960s. Thanks to my studies at Harvard Law School and the research I carried out for Amnesty International on justice in the American South during the long hot summer of 1964, I came to understand the valuable role that international and comparative law, and more specifically litigation, could play in bringing about progressive change."⁵⁹⁰

Indeed, deploying comparative law in litigation is crucial to the methodology of European PILFs. INTERIGHTS sought to directly engage with domestic and regional legal systems via the courts by "assist[ing] human rights advocates to bring cases before national and international courts".⁵⁹¹ At its founding, it described itself as "the only law centre concerned exclusively with the practical application of international and human rights law in national, regional and international courts and tribunals."⁵⁹² In this effort, undertaking comparative legal research to identify how various European and international courts were successfully or poorly deploying (or even not deploying) human rights norms was crucial. Comparative legal research could help identify best practices in European human rights jurisprudence and, given that European law aspires to uniform application, could be very persuasive for courts both

⁵⁸⁸ Van der Vet, "Transitional Justice in Chechnya," 388.

⁵⁸⁹ Madsen, "Internationalisation of Human Rights," 81;

⁵⁹⁰ Interights, *Protecting Human Rights*, 12.

⁵⁹¹ Ford Foundation, Grant File, Appropriation No. 270J for Eastern Europe Overseas, Grant No. 965-0180, the International Centre for the Legal Protection of Human Rights, Nov. 29, 1995.

⁵⁹² Harlow and Rawlings, *Pressure through Law*, 246–47.

domestically and internationally.⁵⁹³ To carry out its mission, INTERIGHTS relied on a small team of on-staff lawyers and the support of a broad network of volunteers including law student interns, barristers and others lawyers and legal academics across Europe.

Another example, the European Roma Rights Centre, which was founded by the Open Society, was dedicated, from its birth in 1997, to investing its resources into tackling, through litigation, violence against Roma and discrimination in access to education, and promoting a culture of PIL across the region. A decision was apparently taken at some point in 1998 to invest significant resources⁵⁹⁴ on a test case that would secure a judgment from the ECtHR, finding that the exclusion of Roma children from regular secondary education, practiced across CEE, amounted to unlawful racial discrimination.⁵⁹⁵ This effort resulted, (albeit some ten years later), in the now famous Grand Chamber decision in *DH and Others v. the Czech Republic*.⁵⁹⁶ James Goldston (now Director of the Open Society Justice Initiative and who was the legal director of the ERRC from its founding in 1997 until 2002) points to the significant impact he believes public interest law had on the region, pointing towards the fact that, by 2006, 60 per cent of all applications to the ECtHR originated from CEE.⁵⁹⁷

This is the kind of activity the funders were interested in bankrolling and institutionalizing, ambitious and pioneering NGOs engaged in social change litigation i.e. “transgressive” lawyering, embracing the political and social causes of client communities and seeking to use law (in the words of the NAACP’s Charles Hamilton-Houston) “to force reforms where they could have no chance through politics”.⁵⁹⁸ They wanted to promote law reform activities carried out by legally tooled civil society actors who could utilize the international (or regional) human rights framework to, potentially, produce radical changes at the domestic level. In the

⁵⁹³ The importance of comparative law in such transnational public interest lawyering stemmed from multiple factors. In particular, legal doctrines originating in both the European Union and the Council of Europe (via the jurisprudence of the European Court of Human Rights) designed to retain a flexible degree of national sovereignty within Europe, such as “consistent interpretation,” “consensus,” “margin of appreciation” and “subsidiarity.” In addition, there is interplay between European-level and national norms through a general process of harmonization of law within the EU, the incorporation of European human rights law and other international law jurisprudence into EU jurisprudence and vice versa, and the EU policy process, which is informed by constant surveying of national legal systems in various policy areas. As a result, European lawyers (judges, academics, policy makers, legislators, public interest lawyers etc.) need to have strong grounding in comparative law (for both horizontal and vertical comparisons).

⁵⁹⁴ An ERRC board member reports a figure of around 150,000 euro, while total grants to the ERRC from both funders since its founding amount to tens of millions of euros. See Farkas, “Scene after Battle,” 63.

⁵⁹⁵ Goldston, “Ending Racial Segregation in Schools,” 1.

⁵⁹⁶ Application No. 57325/00.

⁵⁹⁷ Goldston, “Public interest litigation,” 495–99.

⁵⁹⁸ Scheingold and Bloom, “Transgressive cause lawyering,” 212; McNeil, *Groundwork*, 85.

words of Schull, “PIL appeared to be a vehicle for moving the human rights agenda from an abstract ethical plane to a more practical legal level.”⁵⁹⁹

3 Conclusion

The central objectives in this chapter were to provide historical context to pro bono lawyering and social justice lawyering more broadly in Europe, to explore how pro bono has been practiced in Europe throughout history and to explore a number of contemporary progressive legal advocacy movements in Europe. All of this was to better understand the historical context into which (as will be explored in the next chapter), Big Law Pro Bono has been transplanted.

We have reviewed the different shapes that pro bono, as a social practice, as a resource and as a social institution, has taken at various points in European history and we have seen the role that broader historic social and political developments have played in determining this shape. Whether it be political inequality, the monetization of legal services in Ancient Athens and Republican Rome, the growing power of institutionalized religion and European legal professions in the Middle Ages or the emergence of social contractarian theories and the Welfare state in the Early Modern and Modern eras, insofar as these factors have all played a role in shaping and re-shaping the legal profession and the provision of legal services, they have also played a role in shaping the practice of pro bono. We have noted how models of pro bono have fluctuated throughout the ages, from individualized ad hoc pro bono, which is likely a consistent feature wherever you have a professionalized practice of law, to semi-organized, highly organized and even institutionalized models of pro bono. The degree of sophistication seems to correspond to the degree of complexity of the practice of law, the number of practice sites and areas of social life upon which it is applied and consequently the variety of ways in which law impacts the average citizen. We have also noted that the rationales for pro bono have changed throughout the ages, from communal solidarity, civic duty, kinship and patronage and aristocratic honor in Ancient Athens and Republican Rome, to charitable and professional duty and social contract theory in the Middle Ages, the Early Modern Era and 20th Century.

⁵⁹⁹ McClymont and Golub, *Many Roads to Justice*, 234.

We have seen that commencing in Ancient times, with the monetization and professionalization of legal services, and through to the 20th Century, there has been a consistent and growing concern with access to justice, defined narrowly as the access of the poor and the needy to legal services and to procedures for administering justice. Access to justice, defined in this way, has been the major objective of pro bono practice throughout the ages in Europe. We further noted that, with the emergence of nation states and then the European social state, the obligation of ensuring access to justice gradually shifted from a charitable or professional duty of lawyers and the organized bar, towards a constitutionalized civic right, institutionalized in the form of state-funded legal aid systems.

Separately, we have explored how novel models of social justice lawyering emerged in the late 20th Century, which both embraced and transcended conventional public service norms (neutrality, impartiality) implicit in much of the pro bono lawyering practice throughout European history, and fused them with both human rights frames and political and transgressive ideologies that had been cultivated in Soviet-era Central and Eastern Europe. We explored how these new models of social justice lawyering sought to recalibrate the American model of public interest lawyering for the European legal and political context. We have suggested that, broadly, they pursued the wide conception of access to justice (as defined in Chapter 2) insofar as they sought norm change, altering both the processes and outcomes of existing judicial mechanisms, and so redefining “justice” in favor of marginalized and underrepresented groups and social and political pariahs. Ultimately, we have concluded that these new models of social justice lawyering represented a significant departure from the models of pro bono lawyering that had been practiced throughout much of European history.

In the following chapter, we will commence with the empirical portion of this thesis and we will explore how Big Law Pro Bono came to be transplanted in Europe and how the shape that it has taken differs significantly from its American forbearer.

CHAPTER 4 – The Emergence of Big Law Pro

Bono: An Investigation of How Big Law Pro Bono has Come to Exist in Europe and the Shape it has Taken

In Chapter 1, we established that one of the most significant gaps in the existing literature on Big Law Pro Bono, for the purpose of this thesis, relates to the globalization of Big Law Pro Bono as an institutionalized set of practices and functional roles. Separately, in Chapter 1 and 2, we have defined “access to justice” and suggested that both within the literature on pro bono and in the practice of Big Law Pro Bono in the US, access to justice is understood very narrowly, i.e. in terms of civil legal aid for low-income individuals. We have suggested that this was largely consequent upon the historical context in which Big Law Pro Bono was institutionalized in the US, i.e. between two distinct historical moments: on the one hand, the War on Poverty and the emergence of the Office of Economic Opportunities Legal Services Program and, on the other hand, the subsequent decline in federal spending on civil legal aid. The bottom-line being that Big Law Pro Bono has come to be understood functionally in the United States as a solution to the “justice gap”, i.e. as a resource oriented toward the provision of civil legal aid for low-income individuals. In Chapter 3, historical context was provided for pro bono lawyering and social justice lawyering more broadly in Europe.

In this Chapter, the overriding objective is to explore the globalization of Big Law Pro Bono by answering the question: *how did Big Law Pro Bono come to exist in Europe and what shape has it taken in this new context?* In the next Chapter, we will explore why it has taken the shape that it has. The overriding objective for this Chapter, (to explore the globalization of Big Law Pro Bono) will be achieved by way of three sub-objectives. Firstly, we will briefly refresh our understating of Big Law Pro Bono in the United States, note some of its defining features, and recall how it came to take the institutional shape and orientation that it did (Section 1.1). Secondly, we will explore the process by which Big Law Pro Bono travelled from the United States to Europe between the 1990s and early 2000s (Section 1.2). Finally, we will explore the institutional features of Big Law Pro Bono in Europe today and discuss to what extent it diverges from its American forbearer (Section 2).

As explored in Chapter 1, in the United States, low-income individuals make up the largest category of pro bono clients while studies have suggested that pro bono accounts for between one third and one quarter of the full-time lawyer equivalent staff within the US civil legal aid system.⁶⁰⁰ Indeed, a 2016 survey revealed that 85% of pro bono lawyers had provided services directly to individuals as compared to 35.5% who had provided assistance to organizations.⁶⁰¹ Meanwhile, a 2012 survey revealed that 70% of lawyers at large firms (i.e. in this survey referring to firms with more than 100 lawyers) provided free legal services to persons of limited means in the last year (including advice, representation and mediation) whereas just 42% of such lawyers had provided advice to organizations in the same period.⁶⁰² Just 32% of lawyers at such firms indicated that they “typically” served organizations as pro bono clients.⁶⁰³ Moreover, as compared to lawyers at smaller firms, sole practitioners and corporate counsel, lawyers at large firms provided the greatest amount of pro bono legal services to persons of limited means (averaging 77.7 hours per lawyer per year).⁶⁰⁴ It is against such data that we can make sense of the claim of Scott Cummings, that in the United States, “[p]ro bono has thus emerged as the dominant means of dispensing free representation to poor and underserved clients, eclipsing state-sponsored legal services and other nongovernmental mechanisms in importance.”⁶⁰⁵ In this chapter, we will come to see that, in Europe, Big Law Pro Bono does not significantly (or even meaningfully) contribute directly to access to justice for the poor. If we were to define access to justice in the way that it has been defined in the Pro Bono literature and in US Big Law Pro Bono practice, then in Europe, Big Law Pro Bono would seem inconsequential and possibly even unworthy of academic attention (if we commence from the existing body of pro bono literature). Rather, Big Law Pro Bono in Europe has taken a unique shape, to be explored below, and is oriented towards providing legal assistance to Europe’s large population of NGOs. In the next Chapter, referring to the historical analysis in Chapter 3, we will explore the reasons for this.

⁶⁰⁰ Sandefur, “Lawyers’ Pro Bono Service,” 80; Cummings and Rhode, “Managing pro bono,” 2367.

⁶⁰¹ Faith-Slaker, “Supporting Justice,” 8.

⁶⁰² Buczek, Stuth, and Faith-Slaker, “Supporting Access to Justice III,” A-8.

⁶⁰³ *Ibid.*, 11.

⁶⁰⁴ *Ibid.*, 5.

⁶⁰⁵ Cummings, “Politics of pro bono,” 1.

1 US Origins and the Emergence of Pro Bono in Europe

In the following, although we will touch upon developments in Continental Europe, significant focus will be placed on the US and the UK. This is for two main reasons, firstly, because Big Law Pro Bono began to develop in the US between 1970 and the mid-1990s and in the UK, already in the early and mid-1990s, whereas it did not significantly reach the Continent until the early 2000s. Secondly, the institutionalization of Big Law Pro Bono in the United States and in the United Kingdom (or, rather, London) was the cause of, and precondition for, Big Law Pro Bono development on the Continent. Consequently, it makes sense to look at what happened in the US and the UK before we look more closely at Continental Europe.

In the discussion on the US origins of Big Law Pro Bono, in Section 1.1 below, although much of this material has been covered in Chapter 1, the objective here is to provide a quick recap but with a focus on how a specific model of pro bono became institutionalized in the US (i.e. focused on the provision of civil legal aid). As mentioned, given that Big Law Pro Bono in Europe is a direct consequence of the globalization of the US model, it is all the more striking that the European model should look different from its forbearer. In this Chapter, in exploring globalization of Big Law Pro Bono and its institutionalization in Europe, it is thus important to first review its institutionalization in the US.

1.1 US Origins: a steadfast commitment to individual access to justice

In the United States, as in Europe, pro bono legal services (broadly defined) were historically provided charitably and sporadically by individual lawyers.⁶⁰⁶ Mimicking the developments in Europe (explored in Chapter 3), lawyers organized throughout the 19th and in to the mid 20th century to provide pro bono legal services before the state began to subsidize such work in the 1960s. In the US, private “legal aid societies” were established (very often by European immigrants for their own benefit). In contrast to the European models which relied on voluntarism or funding from municipalities, Churches and the like, these were typically charities funded by private sources and staffed by full-time legal aid lawyers to provide civil legal assistance to those who could not otherwise afford a lawyer. Between 1876 and 1946,

⁶⁰⁶ Boutcher, “Institutionalization of Pro Bono Publico,” 19.

some 70 legal aid societies were established across the United States.⁶⁰⁷ However, despite their growth, by 1963 it was estimated that only 400 legal aid lawyers were available to assist a pool of 50 million potential clients.⁶⁰⁸

As explored in Chapter 1, things were to change dramatically during the course of the 1960s and the 1970s as a result of the US “poverty law movement” and “public interest law movement”. These movements saw the emergence of a heavily institutionalized and federally funded civil legal aid system. More to the point, for our purposes here, the movements inspired elite law students as the new “public interest law firms” began to attract the best students and drain the traditional talent pool of large commercial law firms.⁶⁰⁹ One commentator at the time reported young lawyers increasingly “following varied professional paths leading toward neighborhood legal service programs, public defender offices and new public interest law firms, and away from more traditional employment, including the high-paying “corporate” law firms.”⁶¹⁰ As was explored in Chapter 1, elite law firms responded by setting up pro bono programs.⁶¹¹ However, as mentioned previously, what is noticeable about the programs that the law firms set up in this period is their intense orientation towards a narrow definition of access to justice, i.e. providing civil legal aid for low-income individuals. The programs that were set up variously involved: setting up branch offices in poor neighborhoods to service low-income clients; or seconding lawyers to legal service organizations and legal aid offices.⁶¹² There was then, from the dawn of Big Law Pro Bono in the US, a linking of the resource with the ideology of the poverty law movement and the mission to close the “justice gap”.

As noted in Chapter 1, this merger (of pro bono in general and Big Law Pro Bono in particular, with the efforts to promote a narrow conception of access to justice) was deepened in the subsequent years as the Federal government slashed legal aid funding and placed increasing pressure on the private bar to pick up the slack. Against this background context, the organized bar began to put forward pro bono as a response to such calls for greater private volunteerism. With the same stroke, the bar also sought to redefine public service away from more “transgressive” models of public interest lawyering (pioneered during the early days of the

⁶⁰⁷ Ibid., 21.

⁶⁰⁸ Ibid.

⁶⁰⁹ Boutcher, “Institutionalization of Pro Bono Publico,” 22; Handler, Hollingsworth, and Erlanger, *Pursuit of Legal Rights*, 45.

⁶¹⁰ McGonagle, “New Lawyers and New Law Firms,” 1139.

⁶¹¹ Handler, Hollingsworth, and Erlanger, *Pursuit of Legal Rights*, 45.

⁶¹² McGonagle, “New Lawyers and New Law Firms,” 1139–43.

poverty and public interest law movements and which had caused backlash among Republicans both within the executive and in Congress) and towards a more conservative model, with which it was much more comfortable.⁶¹³ Although the 1980s to early 1990s saw pro bono decline as large firms were engaged in rapid economic expansion and growth, limiting their capacity to engage in pro bono work,⁶¹⁴ it was during this period that the organized bar invested heavily into institutionalizing a specific model of pro bono. A model that construed pro bono functionally as a solution to the justice gap created by limited federal spending on civil legal aid.⁶¹⁵ Pro bono was thus increasingly defined as “a commitment by private-sector attorneys to *themselves engage in direct representation* to discharge their service obligations.”⁶¹⁶

The ABA introduced a model rule in 1993, which established an aspirational target of 50 hours and narrowed the definition of pro bono to provide that each lawyer “should aspire to render at least (50) hours of pro bono publico legal services per year,” a “substantial majority” of which targeted to “persons of limited means” or organizations that advocate on their behalf.⁶¹⁷ To promote this model rule, the organized bar began funding non-profit legal services organizations and encouraging collaboration with private law firms and promoting volunteerism within those law firms, where volunteerism meant providing legal services directly to low-income individuals. As suggested in Chapter 1, this discourse, and this vision, would set the course for the second major period of institutionalization within large US law firms. The late 1990s into the early 2000s saw a resurrection of Big Law Pro Bono in the United States. This resurrection coincided with vast reductions in US Federal funding on civil legal aid (in the guise of the Legal Services Corporation). The centralized and state-sponsored civil legal aid system was replaced by a “decentralized network of local organizations designed to meet the needs of the poor through private-sector volunteerism.”⁶¹⁸ The resurrected model of Big Law Pro Bono took shape against this background context and partly in response to this demand for volunteer legal services, to shore up the depleted civil legal aid system. This, and likely a degree of path dependency, ensured that the focus remained squarely on access to justice for individuals, as it had done in the 1970s. In this context, a new institution emerged:

⁶¹³ Cummings, “Politics of pro bono,” 18.

⁶¹⁴ *Ibid.*, 3.

⁶¹⁵ See Cummings and Sandefur, “Beyond the numbers,” 87, suggesting that “[in] the United States, the service ethic has been channeled more narrowly into pro bono activity understood, according to the ABA Model Rules of Professional Conduct, as ‘legal services without fee or expectation of fee’ to ‘persons of limited means’ or organizations that address their needs”.

⁶¹⁶ Cummings, “Politics of pro bono,” 18.

⁶¹⁷ *Ibid.*, 32.

⁶¹⁸ *Ibid.*, 25.

the “clearinghouse”. These purpose-built civil society organizations (e.g. the Pro Bono Institute “PBI” established in 1995) grew naturally in this environment to serve the firms by connecting them and their young lawyers with non-profits and individuals in need of pro bono legal services.⁶¹⁹ From the very beginning, however, clearinghouses were focused largely on generating work for their law firm members that would directly support individual access to justice. PBI already had 135 law firm members by 1996 and 66.5% of the work generated for members through the clearinghouse was focused on securing access to justice for low-income individuals.⁶²⁰

During this period in the 1990s, full-time Pro Bono Counsel were appointed and internal pro bono committees were set up to manage the firms’ pro bono practices. The total pro bono hours at the top 200 US firms shot up from around 1.5 million in 1993 to 4.5 million in 2008 (see Figure 2 below). This combination of trends has transformed Big Law Pro Bono in the US into a highly organized and sophisticated practice with most top law firms featuring in-house pro bono management structures by the early 2000s. The graphs below (Figure 1 and Figure 2) chart the growth of pro bono practice among the top US law firms from the 1990s up to 2008.

⁶¹⁹ Ibid., 52.

⁶²⁰ “The Law Firm Pro Bono Challenge: Law Firm Performance in 1996 and 1997,” Pro Bono Institute, Nov. – Dec. 1999, 6.

Figure 1⁶²¹

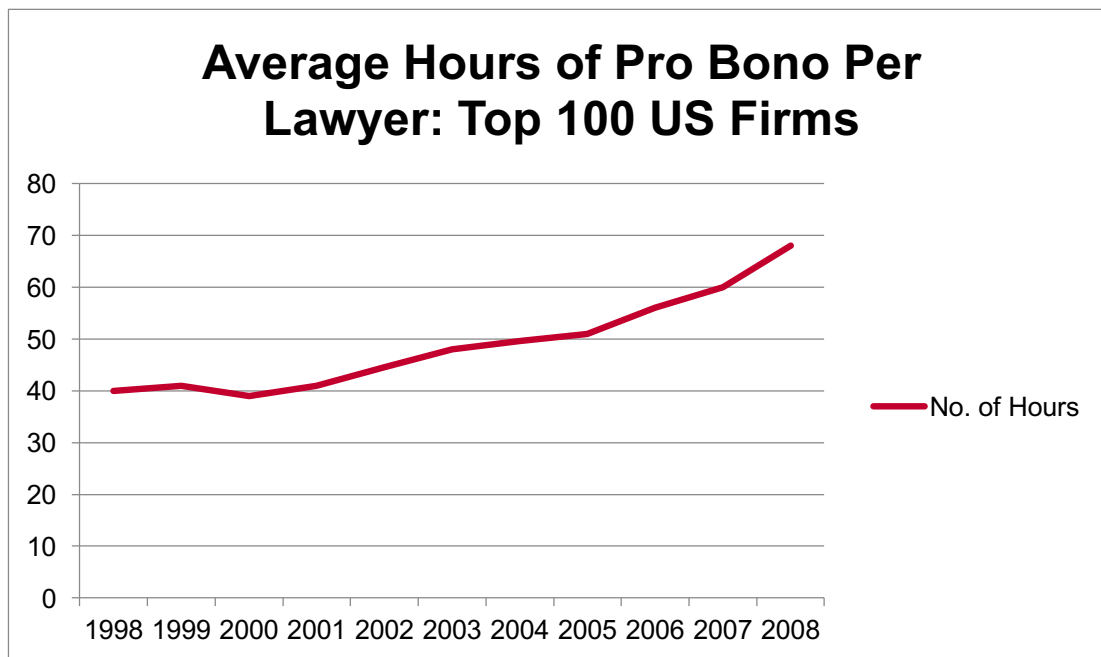
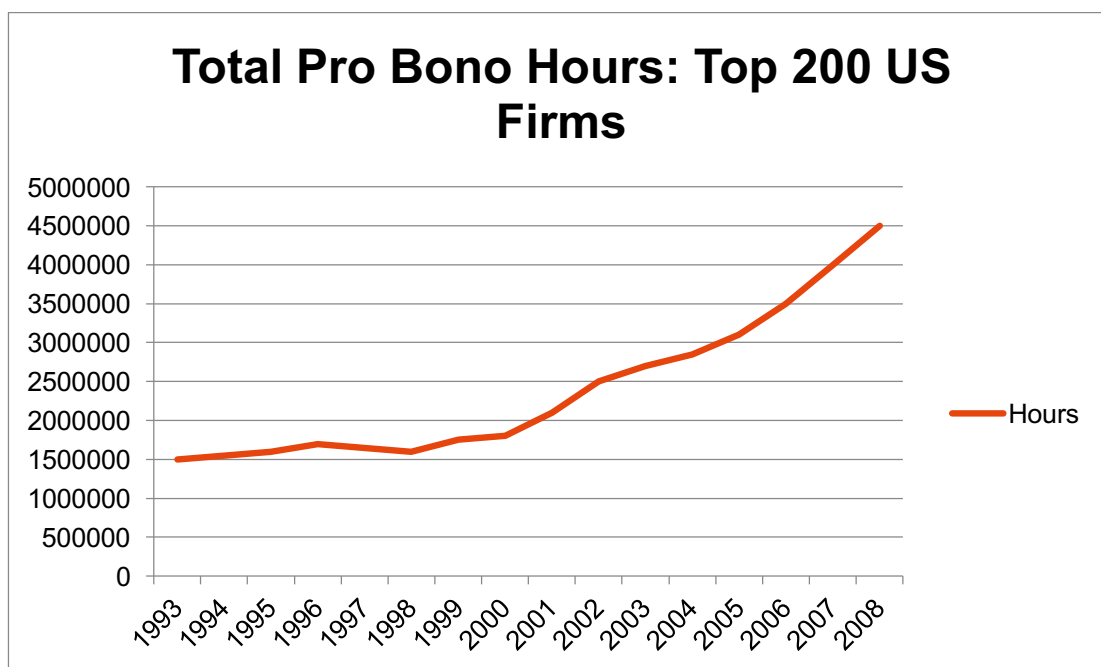


Figure 2⁶²²



By the early 2000s then, Big Law Pro Bono was thriving in the United States. It was a heavily institutionalized de-facto civil legal aid system.

⁶²¹ *American Lawyer*, as quoted in Boutcher, “Institutionalization of Pro Bono Publico,” 35–36.

⁶²² *Ibid.*, 39.

By 2015 the top 200 firms were carrying out 55 pro bono hours per lawyer per year, up from an average of 38 hours in 2001. Meanwhile, between 1993 and 2015, the total number of pro bono hours being carried out by the top 200 firms had increased by over 200% from roughly 1.5 million to roughly 4.75 million.⁶²³

1.2 European origins: the emergence of a “global corporate bar” and the dawn of Big Law Pro Bono in the UK

Between the 1950s and the 1990s the average size of commercial law firms had expanded rapidly. In America, the fifty largest firms in 1950 had an average of only 49 lawyers. By 1979, the average was 321 lawyers and by 2001 621.⁶²⁴ As of 2015, there were 23 US law firms with over 1000 lawyers and an average of 900 lawyers at the top 100 firms.⁶²⁵ Meanwhile, in England, although by 1950 there were already 38 firms with more than 50 lawyers, there was a legal restriction in place until 1967 that limited law firms to not more than 20 partners.⁶²⁶ Consequently, firms stayed smaller for longer. However, once the restriction was removed, they expanded relatively quickly and by 1997, there was an average of just under 200 lawyers among the top 20 firms.⁶²⁷ By 2015, the largest firm, Clifford Chance, had 708 lawyers, followed by Linklaters with 540, while the tenth (Norton Rose) and twentieth (Berwin Leighton) largest, had 310 and 146 lawyers respectively. So, while the top five or so English firms rivalled the top 100 US firms by the late 1990s, many English firms remained significantly smaller. In any event, the rapid growth among both American and English firms between the 1960s and the 1990s, and in to the present day, is clear. In Continental Europe, the pattern is similar to England in that law firms remained smaller for longer. In Germany, until 1989, law firms were prohibited from practicing in more than one city, which effectively prevented the emergence of large law firms.⁶²⁸ Unlike the UK or France, due to Germany's development as a decentralized federalized state there was no centralized legal market organized around a single major economic center (i.e. as in London or Paris). Consequently, when the restriction was lifted, German law firms began to merge and consolidate, connecting offices in multiple major economic centers (Dusseldorf, Frankfurt, Hamburg, Munich and

⁶²³ “Pro Bono Report 2015: Treading Water,” *American Lawyer*, July 20, 2015, <https://www.law.com/americanlawyer/almID/1202730400870/?slreturn=20180818095733>.

⁶²⁴ Cummings, “Politics of pro bono,” 35; Galanter, “Mega-law and mega-lawyering,” 152–76.

⁶²⁵ “The Am Law 100” (Special Section), *American Lawyer* (May 2015).

⁶²⁶ Lee, “From profession to business,” 33.

⁶²⁷ *A Guide to the Legal Profession, 1996–1997* (Chambers & Partners Directory, 1997), 11.

⁶²⁸ Luschin, “Large Law Firms in Germany,” 30.

Berlin). Similarly, in France, firms were prohibited from having more than one office until 1989.⁶²⁹ The Netherlands is somewhat of an outlier in that by the mid-1980s it already boasted larger law firms than any other Continental European country.⁶³⁰ These were largely formed through regional tie-ups of Randstad-based firms, which took place throughout the 1980s. Across the rest of Continental Europe, with the exception of a handful of large French firms, European firms remained relatively small until a wave of internationalization kicked off in the 1990s.

Indeed, in addition to the expansion in size, law firms have been internationalizing at an astonishing rate. The late 1980s into the early 2000s saw extensive international expansion among large American and English law firms. Figure 3 below illustrates the incredible rate of internationalization among six leading global law firms. Across the six firms, there was an average of nearly 350% increase in the number of foreign offices between 1987 and 2016.

Figure 3⁶³¹

Firm	Number of Staff				Number of foreign offices			
	1987	2002	2016	% Increase – 1987 to 2016	1987	2002	2016	% Increase – 1987 to 2016
Baker & McKenzie (US)	1070	3762	4200	+292	30	68	69	+130
Clifford Chance (UK)	803	3180	3400	+323	12	33	34	+183
Jones Day (US)	933	1735	2500	+167	5	29	24	+380
Freshfields (UK)	351	1604	2460	+600	4	28	26	+550
Sidley & Austin (US)	689	1278	1779	+158	3	8	10	+233
Skadden & Arps (US)	852	1680	1700	+99	2	22	14	+600

⁶²⁹ Abel, “Transnational law practice,” 783.

⁶³⁰ Ibid., 795.

⁶³¹ See firm websites for 2016 figures. Figures to 2002 collected from Faulconbridge et al., “Global Law Firms,” 459; see also Beverstock et al., “Long arm of the law”; and Bauman, *Pioneering a Global Vision*.

This internationalization has seen a large increase in the number of European offices maintained by American and English firms. A 2000 study revealed that of the top twenty cities where large law firms maintained offices, 12 were in Europe.

Figure 4⁶³²

Rank	City
1.	London
3.	Frankfurt
6.	Brussels
7.	Paris
10.	Moscow
11.	Amsterdam
12.	Berlin
13.	Budapest
14.	Prague
17.	Munich
18.	Dusseldorf
20.	Milan

Such Anglo-American expansion in Europe was met with varying degrees of caution, protectionism or outright hostility by the local legal professions⁶³³ (reactions that would often be mirrored in the local reception of institutionalized Big Law Pro Bono practice – to be discussed in Chapter 5). For example, in 1984 the Brussels Bar allowed members to enter partnerships with foreign lawyers but imposed a quota on non-European Community lawyers.⁶³⁴ In France, a 1992 law prohibited any foreign law firm established after 1971 from practicing French law and prevented any established before that date from using their firm name.⁶³⁵ In Spain, foreign law firms were prohibited from employing Spanish lawyers while Swedish law prohibited cross border mergers.⁶³⁶ This pattern was common to much of Continental Europe (perhaps with

the exception of the Netherlands), and US and UK law firms managed to operate only by seeking ad hoc permission from local regulators or by finding ways to circumvent such restrictions.⁶³⁷

Ultimately, local Bars would allow foreign law firms in gradually through a series of reforms over a period of time, with a key development taking place in 1998. Within the European legal market, prior to 1998, transitional mergers between European law firms were pursued cautiously and on an ad hoc basis given the varying regulatory environment discussed above. The passing of the 1998 “Establishment Directive” (Directive 98/5/EC)⁶³⁸ (to be implemented

⁶³² Ibid., 460.

⁶³³ See, generally, Abel, “Transnational law practice.”

⁶³⁴ Ibid., 797.

⁶³⁵ Ibid., 785.

⁶³⁶ Ibid., 787, 806.

⁶³⁷ Ibid.

⁶³⁸ “Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained,” *Official Journal of the European Communities* 77, Mar. 14, 1998.

nationally by 2000) by the EU legislature paved the way for European law firms to establish branch offices in other EU member states and to employ lawyers from multiple EU countries within the same firm. Throughout the 1990s and 2000s, Continental European firms, both in response to US firms, and consequent upon the passing of the Establishment Directive, pursued their own internationalization strategies. Dutch firms were the first to engage in transnational mergers in the early 1990s, pursuing tie-ups with firms in Belgium, France and Luxembourg.⁶³⁹ In Germany, there were a series of mergers between large German and British firms in the year 2000 (Clifford Chance merged with Pünder Volhard, Weber & Axster; Freshfields united with both Deringer Tessin Herrmann & Sedemund and Bruckhaus Westrick Heller Löber; Lovells with Boesebeck Droste; and Linklaters with Oppenhoff & Rädler).⁶⁴⁰ Such mergers were not only expansions into Germany, but as many of these German firms already had offices in Central and Eastern Europe and even in Southern Europe prior to the mergers, these mergers represented UK expansion into Continental Europe more broadly.⁶⁴¹

It has also been noted that US and Anglo-European firms pursued different internationalization strategies during this period.⁶⁴² While US firms were typically deploying an “export-model” whereby US trained and qualified lawyers would be sent to satellite offices typically to serve US clients abroad, Anglo-European firms were taking on largely locally trained and qualified lawyers in the foreign offices who were serving both local clients and clients from the home jurisdictions. Consequently, US firms had minimal penetration of the local legal market and minimal engagement with local law and regulation “in so far as they were more likely to provide advice on New York or US law to large multinationals than to serve small and medium-size companies on issues intersecting with the local jurisdictions”.⁶⁴³

This variance in strategy was also reflected in how the firms were managed. While US firms were managed largely from their headquarters which controlled and managed the foreign offices in accordance with US professional standards and practices, the Anglo-European firms were much more horizontal in their management structure and locally trained and qualified partners had much more influence in the overall governance of such firms. This would all have significant bearing on how pro bono would develop in Europe in the coming years.

⁶³⁹ Stewart, “Dutch lawyers,” 13.

⁶⁴⁰ Parnham, “GaWC Research Network,” 207.

⁶⁴¹ *Ibid.*, 141.

⁶⁴² Quack, “Recombining national variety,” 162, 163.

⁶⁴³ *Ibid.*, 163.

As already discussed above, at the time that this international expansion was taking place, Big Law Pro Bono practice was in the process of being (re)institutionalized in large US firms. Around the same time, from around 1996, Big Law Pro Bono was also being institutionalized in the largest London firms. In England, however, this was not a bottom-up movement of young idealistic lawyers, but rather a process of firms reluctantly and slowly embracing pro bono practice under pressure from multiple directions. Ultimately, there were four primary factors leading to the emergence of pro bono practice in large London law firms: pressure from the British political establishment on London firms to make a greater contribution to society and threats of compulsory pro bono; the growth of a corporate volunteering movement led by FTSE 100 companies (also clients of London law firms) which in turn led to firms becoming increasingly aware of the PR benefits of corporate volunteering and identifying, in pro bono, the legal sector's response to the corporate volunteering movement; the fact that the English Bar had established a coordinated pro bono program, placing pressure on the solicitors firms to do the same; and the fact that US firms began to both promote pro bono practice in their London offices and appoint full-time pro bono managers based in London for their UK and European practices.

As you will recall from Chapter 3, in Britain, the pioneering Legal Aid and Advice Act was passed in 1949 radically altering how legal services were provided to the poor. From that point forward, the government compensated private lawyers who provided free legal assistance.⁶⁴⁴ By 1950, the resulting system provided legal aid to 80% of the population, reaching as far as the lower middle class.⁶⁴⁵ However, between the 1950s and the 1980s the system became hugely expensive and by 1989, the British government was spending twice as much per capita on civil legal aid than its closest rivals in Europe (the Dutch and the Swedish), more than three times as much as the Germans and more than ten times as much as the French.⁶⁴⁶ The system had expanded in a number of ways: government spending dramatically increased; the percentage of lawyers (both solicitors and barristers) involved in the system soared; the number of citizens applying successfully for legal aid had increased; and the types of legal assistance being provided through the system has significantly expanded.⁶⁴⁷

⁶⁴⁴ Morgan, "The Introduction of Civil Legal Aid," 66-70.

⁶⁴⁵ *Ibid.* 73.

⁶⁴⁶ Cooper, "English Legal Services", 254.

⁶⁴⁷ *Ibid.*

This was all due to a range of factors including the growing number of lawyers thanks to the increasing accessibility of legal education and also a surge in the number of divorces between 1950 and 1980 (and legal aid certificates being issues for divorce proceedings).⁶⁴⁸ Between 1980 and 1992 alone, government expenditure on legal aid increased by over 600%.⁶⁴⁹ The Conservative government responded between 1992 and 1995 by introducing a series of measures which collectively constituted the most significant cuts to the system since it was introduced in 1949.⁶⁵⁰ The cuts chiefly consisted in reducing eligibility (i.e. the percentage of the population eligible for legal aid) and reducing fees (i.e. lawyer remuneration). The cuts caused significant backlash from the legal profession (both the Bar, representing Barristers and the Law Society, representing solicitors) and the Labour opposition.⁶⁵¹ The Law Society launched a “Save Legal Aid” campaign across the country. The Labour party however, despite its opposition to the government measures, could not commit to big increases in the legal aid budget.⁶⁵² Instead, part of their response to the cuts, and the anger these caused within the profession and the broader society, consisted in turning the heat up on a certain “section of the legal profession” (i.e. Big Law). In 1994 Labour’s legal affairs spokesman (shadow justice minister), Paul Boateng, complained that there was “a section of the legal profession that makes no contribution at all, apart from direct taxation, to the traditional duty and responsibility of lawyers as a profession to the proper and equitable administration of justice”, and by 1996, he was threatening legislation to force the issue (i.e. mandatory *pro bono*).⁶⁵³

It was against the background context of threats to the legal aid system and the ballooning legal aid budget that a Working Party on *pro bono* was established within the Law Society in 1992. The aims of its founder – Andrew Phillips (now Lord Phillips of Sudbury) – however, were less focused on the crisis in legal aid and more focused on what he saw as a crisis within commercial legal practice. He sought “to combat the impact of ‘intense specialization, giantism and decommunalisation on the part of commercial lawyers’ and to bolster professional

⁶⁴⁸ For example, the greater role played by solicitors in advisory welfare law matters and a tightening of the immigration system and increased sophistication of lawyers in response. See Brooke, “The History of Legal Aid,” 10, 11; and Abel, “English Lawyers Between Market and State,” 240.

⁶⁴⁹ Cooper, “English Legal Services,” 255.

⁶⁵⁰ *Ibid.*; see also, Brooke, “The History of Legal Aid,” 11.

⁶⁵¹ Abel, “English Lawyers Between Market and State,” 242–249.

⁶⁵² *Ibid.* 250.

⁶⁵³ Boon and Whyte, “Charity and Beating,” 181.

ideology”.⁶⁵⁴ At the time Philips was a renowned charity lawyer and was Senior Partner in the London-based commercial law firm that he had founded, Bates, Wells & Braithwaite. Not incidentally, Philips was also involved, during this period, in the leading corporate social responsibility initiative in the UK, Business in the Community (BITC – to be discussed further below).⁶⁵⁵

Phillips chaired a session on pro bono at the Law Society Conference in 1993. Unfortunately, Philips initial efforts met with failure; the conference revealed a lack of appetite within the profession to engage in pro bono and a shared belief that the profession could better invest into lobbying the government for more legal aid.⁶⁵⁶ Given the broader context of severe government cuts to the legal aid system, this is perhaps not surprising. A report prepared by the Working Group following the conference unambiguously concluded that the state-sponsored legal aid scheme “represented an acknowledgment by the state that primary responsibility for ensuring access to justice for all lies with the Government, not with the profession”.⁶⁵⁷ The report suggested that “the profession's acceptance of an ethical responsibility to do pro bono may weaken the state's obligation to make adequate provision.”⁶⁵⁸ It was, the profession felt, the role of the Social Bar (i.e. specialized legal aid lawyers), as funded by the government, to address questions of access to justice and gone were the days when this concerned the whole of the profession. Indeed, the Working Party suggested that pro bono culture was a remnant from times when the practice of law was a “protected monopoly” and that, with increasing competition among solicitors, such duty had evaporated.⁶⁵⁹

Nevertheless, the report conceded that firms might engage in *voluntary* pro bono services in areas of law *not covered by legal aid*.⁶⁶⁰ Despite this concession, the report, in the words of Phillips “more or less died an instant death”.⁶⁶¹ A subsequent attempt by Phillips to introduce a rule equivalent to (and inspired by) the ABA pro bono rule in the US also failed, as did a proposal (also inspired from the US) by notable civil liberties lawyer Geoffrey Bindman to

⁶⁵⁴ Notably, Phillips had also played a role in the English “law centre movement” (discussed in Chapter 3) as founder of the Legal Action Group in 1971. *Ibid.* 176.

⁶⁵⁵ Philips, “The Charity/Business Duet”.

⁶⁵⁶ Boon and Whyte, “Charity and Beating,” 181.

⁶⁵⁷ *Ibid.*

⁶⁵⁸ Abbey and Boon, “The Provision of Free Legal Services by Solicitors”, 265.

⁶⁵⁹ *Ibid.*

⁶⁶⁰ *Ibid.*

⁶⁶¹ Boon and Whyte, “Charity and Beating,” 176.

have large firms contribute interest on client accounts to a pro bono fund.⁶⁶²

The issue was that the Working Party was divided, with major resistance (especially to *mandatory* pro bono) coming from City firms (Big Law) within the group, led chiefly by John Kennedy, a senior partner at Allen & Overy.⁶⁶³ Perhaps the most significant aspect of the report, likely a result of the internal conflict within the group, was the manner in which it defined “pro bono”, well beyond individual access to justice to explicitly to include legal and non-legal work (and financial donations) carried out for charities and civil society organizations (or in the words of the report “community organizations”).⁶⁶⁴ Indeed, much of the early pro bono work performed by Big Law in London was for charities and local civil society and, in particular, so-called “local enterprise agencies”. Local enterprise agencies (what might be called business “incubators” today) were essentially joint ventures between large companies and local authorities which sought to help stimulate small business growth by providing assistance to start-ups and small businesses, particularly in depressed communities. For example, Clifford Chance provided legal assistance to a project in Brixton (a largely Black British community in South London, rocked by race riots in the early 1980s) which leased out workshops for new businesses and Linklaters provided free legal advice to a community health centre.⁶⁶⁵ Writing in 1996, Bindman complained of such initiatives that:

*“[f]or the most part [...] they are restricted to acts of pure charity or to commercial areas of law in which the firms concerned have particular expertise. No doubt these initiatives also have promotional or marketing value, presenting an appealing image of unselfishness and social concern. What they lack is any significant impact on the daily legal problems of ordinary people in such matters as housing, crime, employment, immigration, discrimination, and welfare.”*⁶⁶⁶

However, the focus of Big Law on this model of community oriented pro bono was not by accident and related to link between the firms and the leading British Corporate Social Responsibility (CSR) initiative, Business in the Community. BITC had been founded in 1981 following the so-called “Sunningdale conference” which brought together 17 corporate and

⁶⁶² Ibid. 177

⁶⁶³ Ibid.

⁶⁶⁴ Ibid.

⁶⁶⁵ “Justice for the Ordinary Man,” *The Lawyer*, 2 April 1996, 7.

⁶⁶⁶ Ibid.

government officials from the UK and 10 from the US to discuss “Corporate Community Involvement”.⁶⁶⁷ The idea for the conference came from Ministers within the British Ministry of Environment (both Labour and subsequently Conservative ministers were involved in the planning) who had been inspired by the US CSR and urban renewal movements.⁶⁶⁸ The Ministers invited heads of British business along with a number of American business leaders who had played a role in the urban regeneration of Baltimore and Detroit in the 1970s.⁶⁶⁹ There was apparently a feeling, among government and business on both sides of the Atlantic, that with the elections of Ronald Regan and Margret Thatcher, there was a need for business to step up to respond to the shrinking role of the State in society.⁶⁷⁰ The British participants blamed the welfare state for the UK lagging behind the US in terms of CSR, with one conference delegate suggesting:

“Whatever the merits of Britain’s welfare state and its services, and its taxes, it tends to encourage the firm impression among many that the well-being of fellow citizens is essentially someone else’s business. Hence it is not surprising that industry and commerce do not readily accept that they might have a commitment to the welfare not only of their employees but also to the community in which they exist”.⁶⁷¹

BITC was founded shortly after the conference by ten member companies in 1981 including Shell (from which the first two full-time staff members of BITC were seconded), IBM, Marks & Spencer, Barclays, Legal and General and BP.⁶⁷² Indeed, many of the original founders were strong supports of the Thatcher government and saw BITC as complementary to the “small government” policies she championed. The focus of BITC at the outset was on engaging business in helping to regenerate local economies, particularly in urban areas depressed by corporate closures.⁶⁷³ This was achieved through cash donations to local businesses, reskilling of workers, providing premises, equipment and, crucially for our purposes, employee volunteering.⁶⁷⁴ In 1989, BITC founded a “Professional Firms Group”, the idea being that professional firms would “volunteer in crosssectoral teams to provide pro-bono help to

⁶⁶⁷ Kinderman, “Free us up so we can be responsible!”, 39.

⁶⁶⁸ Ibid.

⁶⁶⁹ Grayson, “Business-Led Corporate Responsibility Coalitions”, 16.

⁶⁷⁰ Kinderman, “Free us up so we can be responsible!” The co-evolution of Corporate Social Responsibility and neo-liberalism in the UK”, 39.

⁶⁷¹ Ibid.

⁶⁷² Ibid. 40.

⁶⁷³ Grayson, “Business-Led Corporate Responsibility Coalitions”, 5.

⁶⁷⁴ Ibid. 13.

community projects”.⁶⁷⁵ By 1996, over 200 firms had joined the Professional Firms Group, 40 of which were law firms.⁶⁷⁶ It was through BITC that Clifford Chance and Linklaters were receiving pro bono opportunities linked to Local Enterprise Agencies.⁶⁷⁷ BITC was “effectively running a clearinghouse for accountants and lawyers” at this time.⁶⁷⁸ It was momentum from BITC, along with a few other factors, that would ultimately lead to momentum within the Law Society and among the City firms.

In addition to the momentum coming from BITC, the Law Society was coming under pressure from a number of directions to make more progress with respect to solicitors pro bono. Indeed, as noted above, by 1996 Boateng (Labour’s shadow justice minister) was threatening legislation to compel mandatory pro bono.⁶⁷⁹ He wrote to the head of the Law Society indicating that, if progress was not made, he would impose “other alternatives of a statutory nature, if necessary”, once Labour came into power (by the time it was clear that Labour were likely to win the next general election 1997).⁶⁸⁰ In the same year the Bar, also under pressure, set up a “pro bono unit” as an independent charity to coordinate pro bono work amongst barristers.⁶⁸¹ The legal press urged solicitors to follow in their footsteps suggesting that, “[s]urely it is time for the profession either to follow the Bar’s lead or seek some form of cooperation with it on the matter”.⁶⁸² Moreover, in his letter to the head of the Law Society, Boateng praised the Bar for setting up its own pro bono unit but regretted “the Law Society would appear to have done nothing to build on the recommendation of its own pro bono working party in 1994.”⁶⁸³ Undoubtedly all of this created some pressure on the Law Society and its President, trying to explain the lack of progress to the legal press, suggested that, “if the Law Society is seen to be actively pushing the profession into pro bono we could ruin the goodwill of certain parts of the profession. This may do more harm than good.”⁶⁸⁴

As pressure mounted, things began to budge. It started with the founding in 1996 of the Solicitors Pro Bono Group (SPBG, now “Law Works”) by Phillips and Caroline Knighton,

⁶⁷⁵ Ibid. 24.

⁶⁷⁶ Boon and Whyte, “Charity and Beating,” 187.

⁶⁷⁷ “Justice for the Ordinary Man,” *The Lawyer*, 2 April 1996, 7.

⁶⁷⁸ Interview number 17, Nov. 3, 2015.

⁶⁷⁹ Boon and Whyte, “Charity and Beating,” 181.

⁶⁸⁰ Ibid.

⁶⁸¹ “Good Works Need to be Coordinated,” *The Lawyer*, 15 October 1996, 13.

⁶⁸² Ibid.

⁶⁸³ “Boateng in Threat to Impose Pro Bono Rules,” *The Lawyer*, 10 December 1996, 1.

⁶⁸⁴ “Solicitors Rally for UK Pro Bono Scheme,” *The Lawyer*, 15 October 1996, 1.

head of BITC Professional Firms Group.⁶⁸⁵ SPBG was established to unite and centralize the pro bono efforts of lawyers across England and Wales. Founding firms included Mishcon de Reya, Linklaters & Paines, Clyde & Co, Baker & McKenzie and Clifford Chance. Funding for SPBG was provided directly by the firms themselves (which continues to be the case today).⁶⁸⁶ At the launch, both the Law Society and the founding law firm members were keen to underline that any coordinated pro bono efforts should not undermine the legal aid system.⁶⁸⁷

Its membership grew rapidly and by 2000, already included 130 firms and 40% of the top 50 firms.⁶⁸⁸ A process of institutionalizing pro bono practice commenced at the very top English law firms as they began to appoint full-time pro bono managers and directors and implement pro bono policies. The first was Lovells (now Hogan Lovells), which appointed Yasim Waljee (now OBE) in 1997, followed by Felicity Kirk at Clifford Chance a few months later; Linklaters and Allen & Overy followed shortly after this.⁶⁸⁹ Kirk was an asset finance lawyer working at Clifford Chance and had gotten involved in non-legal volunteering through BITC. She was considering taking a position with BITC to run the employee volunteering scheme for the Professional Firms Group but was persuaded by Tony Willis (Partner at Clifford Chance and one of the key founding members of the SPBG) to take a full-time pro bono manager position with Clifford Chance instead.⁶⁹⁰ The impetus to hire Waljee came from the US rather than from BITC. Litigation Partner at Lovells, Graham Huntley, had been heavily involved in US pro bono Death Row litigation and had appointed Waljee to help him coordinate this work.⁶⁹¹ Firms also began to donate money and undertake more pro bono work for local law centers (providing general legal advice for defined hours, a few times a week, to low income clients in local communities). For example, Allen & Overy agreed to donate up to GBP 15,000 each year to Wandsworth and Merton Law Centre which would include the firm taking on “in-house pro bono cases” in addition to providing lawyers for the advice sessions.⁶⁹²

Despite such progress, a 1998 survey, conducted by *The Lawyer* magazine, into the pro bono practice of the top 120 British firms concluded that, “the vast majority of firms are at best

⁶⁸⁵ Boon and Whyte, “Charity and Beating,” 182.

⁶⁸⁶ “Getting the Profession Behind the Pro Bono Cause,” *The Lawyer*, 26 May, 1998, 2.

⁶⁸⁷ “Solicitors Vote for Boost to Pro Bono,” *The Lawyer*, 12 November 1996, 1.

⁶⁸⁸ Boon and Whyte, “Charity and Beating,” 183.

⁶⁸⁹ Interview number 17, Nov. 3, 2015.

⁶⁹⁰ *Ibid.*

⁶⁹¹ Interview number 22, Nov. 25, 2015.

⁶⁹² “A&O Boosts Cast to Local Law Centre,” *The Lawyer*, 17 September, 1996, 2.

apathetic, at worst dismissive”.⁶⁹³ Nevertheless, the next 5 to 10 years would see large progress being made. Already by 1999 there were six firms that maintained full-time pro bono personnel.⁶⁹⁴ It was also during this period that corporate clients of large law firms began to embrace the pro bono spirit; in 1999 the in-house legal team of British Aerospace, part of the BITC movement, adopted a policy requiring law firms to undertake pro bono work or face being dropped from their panel of legal advisors.⁶⁹⁵ The evidence suggests that various other corporate clients began to follow suit.⁶⁹⁶ Indeed, Clifford Chance in a 1999 statement provided to *The Lawyer* magazine revealed that, “[w]e recently had a request for information on our community policy for a major client. In the US, this is a common practice and our clients increasingly expect us to be actively involved in community affairs - as they are.”⁶⁹⁷ The point here is that, increasingly, Big Law firms were being asked about their corporate social responsibility practices by corporate clients when they were being evaluated in pitches; this created a further incentive for firms to take pro bono seriously.

The progress achieved in the late 1990s and early 2000s led to the gradual institutionalization of pro bono practice in large commercial law firms in England. In 2002, just 15% of lawyers at firms with over 81 partners were engaging in pro bono practice. By 2012, that figure had soared to 45%.⁶⁹⁸ Meanwhile, just over 30% of lawyers in firms with 26 or more partners were engaged in pro bono work in 2002. That figure jumped to 57% by 2007 (although it dropped again to 41% by 2012). Even in 2009, in the midst of the financial crisis, very large City firms were reporting growing rates of pro bono. Linklaters reported a 23% increase of pro bono activity in their London office between 2007-2008 and 2008-2009.⁶⁹⁹ Clifford Chance reported an 8% increase in the same period and indicated that over half of its lawyers were now involved in pro bono work of some kind. Tom Dunn (the Pro Bono Director at Clifford Chance) said at the time, “I put the increase in pro bono activity at Clifford Chance down to its steady on-going institutionalization”.⁷⁰⁰

⁶⁹³ Boon and Whyte, “Charity and Beating,” 180

⁶⁹⁴ “Who is behind pro bono? As the director of the Solicitor’s Pro Bono Group resigns, Matheu Swallow asks where the group goes from here,” *The Lawyer*, September 27, 1999, 14.

⁶⁹⁵ Boon and Whyte, “Charity and Beating,” 187.

⁶⁹⁶ *Ibid.*, 188.

⁶⁹⁷ “The Pro Bono Myth Laid Bare,” *The Lawyer*, 15 March, 1999.

⁶⁹⁸ “The Pro Bono Work of Solicitors: Findings from Omnibus Survey Nine 2002,” *Law Society*, prepared by the Strategic Research Unit, 2002, 5; and “The Pro Bono Work of Solicitors: PC Holder Survey 2014,” *Law Society*, 2014, 5.

⁶⁹⁹ “Pro Bono Work Flourishes in Spite of Economic Downturn,” *The Lawyer*, November 9, 2009, 56.

⁷⁰⁰ *Ibid.*

What is very noticeable about the development of Big Law Pro Bono in the UK, as contrasted to the US, is the total hostility of firms, from the very beginning, to defining Big Law Pro Bono in a way that would require the firms to undertake work directly for low-income individuals (i.e. promoting direct access to justice for individuals).⁷⁰¹ This, despite pressures from multiple directions to do so. Criticism from the left of the political establishment which, as noted above, had been the major catalyst for Big Law Pro Bono in England had been chiefly premised on the argument that Big Law should play a greater role in shoring up the legal aid system, either in the form of a tax on commercial law firms that would go towards legal aid funding or in the form of Big Law lawyers simply doing more pro bono work.⁷⁰² Meanwhile, Phillips (the primary driver of early pro bono efforts) had been heavily involved in the “Law Centre Movement” (discussed in Chapter 1) which saw over 3000 lawyers collaborating with community workers to provide heavily discounted legal assistance to persons who were not otherwise being serviced by the profession (in the model of a family/community doctor) and evidently took this as inspiration in his efforts to promote pro bono at the top of the profession.⁷⁰³ Similarly, Bindman, the other major advocate for solicitors pro bono from the very beginning, as noted above, was deeply concerned that large firms should focus less on providing support to community organizations and more on the needs of average people (“housing, crime, employment, immigration, discrimination, and welfare”).⁷⁰⁴ However, as described above, Philips’ and Bindman’s initial efforts at promoting this model of pro bono within Big Law were met with failure. This opposition of Big Law to engaging in legal aid work (for fear of undermining the legal aid system and shifting the duty from the state back onto the profession) remained steady over the years as increasingly drastic cuts were made to the state-funded legal aid system. In 2006, a group of 28 City firms took the unprecedented step of openly lobbying the government to protect the legal aid system.⁷⁰⁵ Commenting at the time, the Law Society chief executive, Des Hudson, said: “Law firms across the country are united in the fight to convince the Government that cuts to the legal aid budget will result in thousands of people across the country being denied access to justice.”⁷⁰⁶ What Hudson did not mention, was that a large motivation of the firms in taking this stance was probably to ward off

⁷⁰¹ Boon and Whyte, “Charity and Beating,” 176.

⁷⁰² *Ibid.*, 181.

⁷⁰³ As founder of the Legal Action Group in 1971. *Ibid.*, 176, n. 44.

⁷⁰⁴ *Ibid.*

⁷⁰⁵ Claire Ruckin, “Twenty-eight commercial firms join anti-Carter camp as legal aid rebellion mounts,” *Legal Week Daily*, November 20, 2006.

⁷⁰⁶ *Ibid.*

any suggestion that individual access to justice was the responsibility of Big Law. This attitude was also partially reflected in the nature of pro bono work that Big Law got involved in during this period. There was a significant focus - both on the part of the SPBG (which effectively became the first clearinghouse in the UK) and on the part of the full-time pro bono managers - on working for charities (and other forms of legal work that fell outside the legal aid system).⁷⁰⁷ A 2004 survey of the pro bono programs of 40 City firms demonstrated that while firms were providing support to individuals through a number of local law centers (one-off advice clinics for low income individuals), the bulk of law firm clients were charities, community organizations and advocacy organizations.⁷⁰⁸ Another reason for this might be the dual nature of the English legal profession, i.e. it was only natural that a significant amount of pro bono work for individuals (so far as litigation was required) was handled by the Bar and indeed SPBG (Law Works) had a policy of referring such matters on to the Bar.⁷⁰⁹

This orientation of Big Law in London, away from direct individual access to justice (what the firms perceived as “legal aid” work) and towards work for non-profits would, in some ways, set the tone for the development of Big Law Pro Bono across the continent and was one, among a number of reasons, for the distinct model of Big Law Pro Bono that evolved in Europe (to be explored below). Indeed, it is worth recalling that, by the mid-2000s, several of the largest British firms had merged with major German practices, which had also yielded them practices in Central and Eastern Europe amongst other places. Thus, while institutionalized pro bono was unheard of within the largest continental European firms at this time, mergers with UK and US firms during this period paved the way for pro bono in Continental Europe.⁷¹⁰ Moreover, UK based pro bono clients (non-profits), embedded within transnational civil society networks, would ask London firms for support for their affiliates on the Continent.⁷¹¹ Indeed, in Continental Europe (both West and East), the development of institutionalized Big Law Pro Bono culture moved much more slowly and was in some respects an outgrowth from

⁷⁰⁷ Andrew Darling, “PROFESSION – Christmas spirit – why solicitors like working for charities, whether in an in-house capacity from private practice or on a voluntary basis,” *Law Society Gazette*, December 17, 1997; Robert Verkaik, “SOLICITORS AND CHARITIES – Helping hands – how much money solicitors donate to charities, a look at the ‘pro bono’ work which City firms do and solicitors who have sacrificed generous pay packets to work in-house for voluntary organizations,” *Law Society Guardian Gazette*, October 28, 1998; Jonathan Ames, “The Power of Pro Bono,” *Law Society Gazette*, April 25, 2002.

⁷⁰⁸ *A Guide to Law Firm Pro Bono Programmes in England & Wales* (London: Solicitors Pro Bono Group, 2004).

⁷⁰⁹ “LawWorks for Community Groups gets funding boost,” *The Lawyer*, 12 November 2006, 13.

⁷¹⁰ Interview number 22, Nov. 25, 2015.

⁷¹¹ Ibid.

the developments in the UK and the US and the internationalization of Big Law. Although this will be explored further below and in the following Chapter, it is worth pointing out that the first full-time pro bono position in Continental Europe was established only in 2013 by DLA Piper. Ozgur Kahale, an English-qualified Turk, was appointed to be the Pro Bono Director for Europe, based in DLA's Paris office. This was followed in 2016 by the appointment of the author as Pro Bono Associate for Europe to DLA's Amsterdam office. Thereafter came somewhat of a trickle of such appointments as Dentons created two such Europe-wide roles (based in Budapest and Prague) in 2016 and 2017, Hogan Lovells created a role in Madrid in 2017 and Freshfields converted a pre-existing CSR role into a pro bono role in Frankfurt, also in 2017.

What is important to note for present purposes is that by the end of the first decade of the 2000s, pro bono practice had been significantly institutionalized in the top 100 American firms and certainly in the top ten or so English firms. Tie-ups between Continental European firms and US/UK Mega Firms had created a network of European offices in which pro bono practice could potentially be developed. Before we go on to explore what happened next, in the following Chapter, we will first explore what Big Law Pro Bono looks like in Europe today and how this contrasts with the shape it has taken in the United States.

2 Big Law Pro Bono in Europe: what makes it stand out?

In the remainder of this Chapter, we will explore the contours of Big Law Pro Bono in Europe today. As discussed in Chapter 1, the existing literature on Big Law Pro Bono is significantly praxis-oriented and largely revolves around a number of key themes, including the internal organization and structure of pro bono and the actors and roles within the pro bono universe including pro bono professionals and pro bono clients. To date, this literature has primarily focused on Big Law Pro Bono as it has been institutionalized in the United States. Also in Chapter 1, several gaps in the literature were identified, specifically in relation to the role played by intermediary or referral organizations (i.e. clearinghouses) in the US, and also relating to the globalization of Big Law Pro Bono as an institutionalized set of practice and functional roles beyond the US, and the role of clearinghouses in this process. It was suggested that whereas certain features of Big Law Pro Bono are likely to be context transcending and present in any region or jurisdiction where Big Law Pro Bono is deployed, others are likely to

be more context specific and variable depending upon the specific location. Whether a feature falls into the former or the latter category likely depends upon whether that feature flows from the logic of Big Law itself (such as the structures, processes and hierarchies of large commercial law firms or the preferences of multinational corporate clients) or from the logic of the local legal market (such as local Bar regulations or the prevailing system for the provision of legal services to the poor).

In this section I will explore the institutionalized structure of Big Law Pro Bono in Europe today. I will do so by looking at the internal organization and structure of Big Law Pro Bono in Europe. Which I will do by focusing on the law firms themselves (Section 2.1) and on the key actors beyond the firm and their roles, including the pro bono clients and the types of work that are carried out for these clients (Section 2.2) and the clearinghouses (Section 2.3). It is hoped that I can build on the existing literature by exploring to what extent the globalized or Europeanized form of Big Law Pro Bono differs from the US model. In the following Chapter, I will aim to account for the reasons for any differences identified. What stands out is that the main differences in the European model relate to the clients (which are almost exclusively non-profit organizations) and the intermediaries (which are highly varied in origin and nature, but cater almost exclusively to non-profit organizations). As we will come to see, one of the most striking features of Big Law Pro Bono in Europe, in contrast to the US, is how little work is done for low-income individuals (perhaps less than 15% of the work).

The findings below stem from research carried out during my period of participant observation and archival research at the global headquarters of the Global Public Interest Law Network (“PILnet”) in New York, from several interviews with pro bono managers and NGO employees throughout Europe and beyond, and from two surveys carried out among pro bono managers with responsibility for the European offices of international law firms and EU-oriented NGOs based in Brussels.⁷¹²

2.1 Providers

As already noted, in the Big Law Model of Pro Bono, the service providers are large, multi-location (typically international) commercial law firms. In Europe, as in the US, the traditional,

⁷¹² Khadar, *Growth of Pro Bono*; Khadar et al., *Good Lobby Legal Needs Survey*.

commercial, client base of such firms is made up of the largest companies and public institutions in the world (both international and national). The traditional practice areas include, for example, litigation and regulation, employment, real estate, tax, corporate (governance, private equity and capital markets and M&A), intellectual property and technology and finance.

We must notice a few distinctions in terms of the types of firms. As noted above, US firms have, historically, tended to internationalize by sending US lawyers overseas to staff foreign offices. These firms tend to have relatively few overseas lawyers (as a proportion of their total number of lawyers) – perhaps between 10% and 30% around the year 2007 (Skadden Arps, Jones Day and Sidley Austin providing good examples here).⁷¹³ Such lawyers (not being qualified domestically) will typically be engaged primarily in transactional practice such as acquisitions and finance, rather than litigation (which necessarily requires admittance to the local bar), unless we talk of international dispute resolution, such as international arbitration. These firms will typically be led from New York or DC and will have significantly homogenized (American) firm culture. Meanwhile, as also set out above, the largest UK firms pursued internationalization through mergers with large European firms (Freshfields, Clifford Chance and Linklaters all providing good examples here) and have had significantly higher percentages of the lawyers based overseas (outside the UK) – perhaps between 50% and 70%.⁷¹⁴ Consequently, such firms will have greater penetration of local legal markets and greater local autonomy although they will still typically be led from London. The work carried out will be varied. A final type of firm worth mentioning, for our purposes, is the “Swiss Verein” law firm. These are firms that are effectively more like franchises than consistent international firms (DLA Piper, Baker Mackenzie and Dentons provide examples here).⁷¹⁵ These are firms that do not necessarily have a “home” location and have been formed through a series of tie-ups in which profits pools are not shared, although the same branding is used. They operate more like large referral networks than structurally integrated firms (although they become increasingly structurally integrated with time). Consequently, there will be much greater local autonomy and significant cultural diversity. Again, the work will be varied.

As in the US, although the pro bono practices of such firms can be structured in many different ways, as will be explored further below, they are increasingly structured quite similarly,

⁷¹³ Quack, “Recombining national variety,” 162.

⁷¹⁴ Ibid.

⁷¹⁵ Vetula, “From Big Four to Big Law,” 1177.

consisting of firm-wide pro bono policies, full-time pro bono managers or pro bono counsel (responsible for generating and facilitating pro bono work), sometimes a pro bono (or Responsible Business) Partner, local pro bono coordinators (i.e. full-time fee earners with responsibility for allocating pro bono files in their local offices or departments) and pro bono committees (made up of groups of coordinators).

2.1.1 Amount and geography

When it comes to the amount of pro bono work being done in Europe, over the past three years, around 14 hours per fee earner has been carried out on average (see tables below). If you consider that these firms will have at least 300 hundred lawyers based in Europe⁷¹⁶ with the larger ones, such as DLA Piper, having nearly 1500 lawyers based in Continental Europe (i.e. excluding the UK where the majority of large firms will have a substantial presence – DLA has 900 UK-based lawyers), this amount is not insignificant. For a firm with 500 European lawyers, that is 7000 hours per year (although note that DLA Piper alone carried out 35,000 pro bono hours in Continental Europe in 2017, so figures could be significantly higher), which is equivalent to four full-time lawyers working for about one year (8 hours a day, with weekends and holidays). If you then consider that at least 30 firms are doing that level of pro bono in Europe (the Trust Law Index, upon which these statistics are based includes around 30 international firms⁷¹⁷), that amounts to a fairly substantial amount of pro bono work, perhaps the equivalent of at least 120 full-time lawyers. That is clearly not enormous, if you consider that there were nearly 8000 registered legal aid lawyers in the Netherlands alone in 2015 (representing approximately 44% of all lawyers in the Netherlands, although not necessarily all working on legal aid matters full-time).⁷¹⁸ However, if you also consider that the European Commission Legal Service employs fewer than 400 lawyers,⁷¹⁹ it is not insignificant; large enough to make one very large pan-European pro bono firm. Moreover, it should be borne in

⁷¹⁶ Bird & Bird, for instance, is about the fortieth largest firm in the world and the twentieth largest in the UK and has 250 lawyers in London alone (just 25% of its total headcount globally), while Loyens & Loeff, the seventy-fifth largest firm in the world, has over 400 lawyers in the Netherlands alone. See “The Global 100: The world’s top-ranked law firms by revenue, lawyers and partner profits,” *Legal Week*, 2016, <http://www.legalweek.com/sites/legalweek/2016/09/26/the-global-100-the-worlds-top-ranked-firms-by-revenue-lawyers-and-partner-profits/>

⁷¹⁷ See *Trust Law Index of Pro Bono*, 2016, 72, <http://www.trust.org/contentAsset/raw-data/d31d8b72-0f82-4241-88e1-71abc90e3d72/file>.

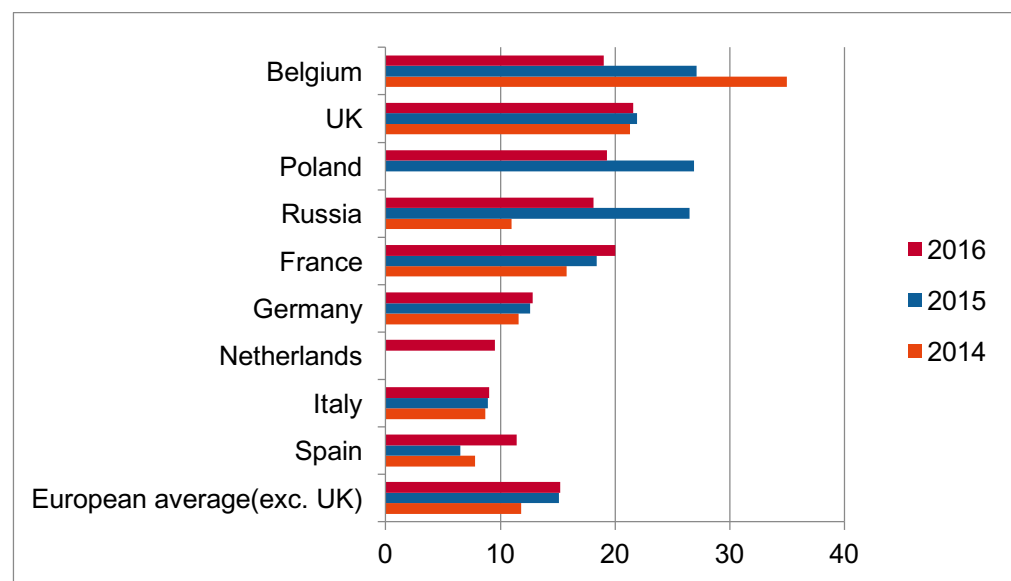
⁷¹⁸ Figures for 2014–2015. See the Netherlands, “National Report: Legal Aid in the Netherlands – A broad outline – 2016,” *Den Haag*, 2013, 29.

⁷¹⁹ European Commission HR key figures, 2017, https://ec.europa.eu/info/about-european-commission/organisational-structure/commission-staff_en.

mind that participation rates (in pro bono work) can be as high as 70% in some offices (DLA Piper had an average participation rate of 56% across all continental Europe offices in 2016 and 2017) and so the total number of commercial lawyers engaged in pro bono work across Europe (at the top 30 law firms) will likely be at least 4500 (based on an average participation rate of 30%) but could be as high as 7500 (based on an average participation rate of 50%).

Figure 5⁷²⁰

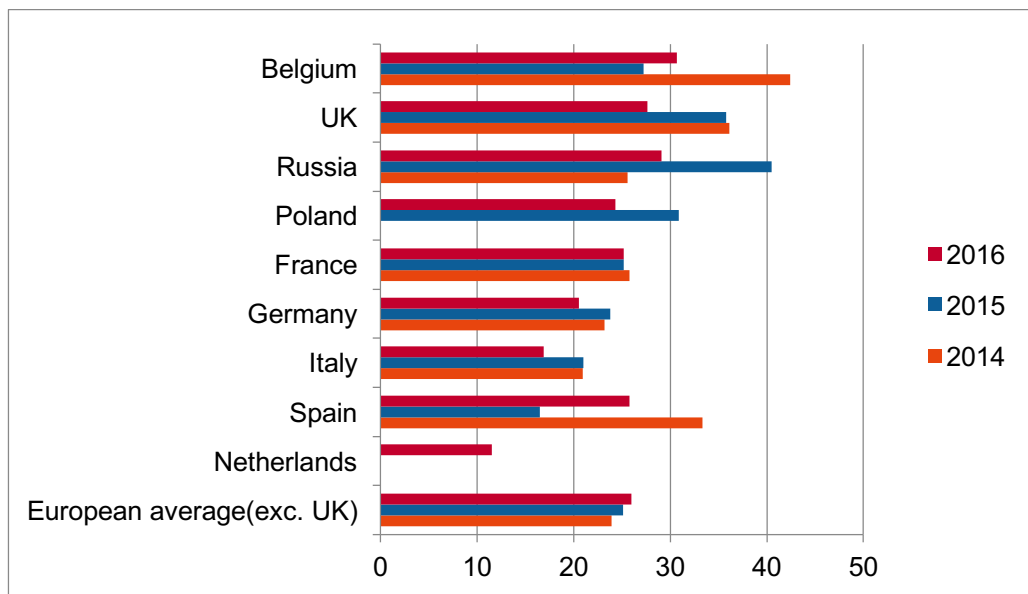
Average hours of pro bono per fee-earner



⁷²⁰ Data courtesy of the Trust Law 2014, 2015, and 2016 pro bono indices, http://news.trust.org/spotlight/TrustLaw_Index_of_Pro_Bono/.

Figure 6⁷²¹

% of fee-earners performing ten or more hours of pro bono



The European hours, however, are significantly behind the US where the average hours per fee earner are 70+ and Australia where the average hours are 40+ but on par with Latin America and the Asia Pacific Region.⁷²²

What about the geography of Big Law Pro Bono in Europe? Unsurprisingly, it tracks well with a map of law firm offices (Europe's major capital cities). However, the UK and Belgium (more accurately *London* and *Brussels*) do appear to be emerging as European pro bono hot spots. While still not quite rivalling their counterparts in the US, Brussels and London based lawyers are undertaking a significant amount of pro bono work (averaging more than 20 hours per lawyer per year). The answer to the question '*why these two cities in particular?*' is not entirely clear. In relation to London it is likely because (as discussed above) pro bono culture is older in London, having gotten off the ground in the 1990s already. Moreover, the survey carried out among 21 firms revealed that London was the second most popular destination globally in which the surveyed law firms based their full time pro bono staff (with New York coming first, Washington DC joint second with London, followed by Chicago in third and Sydney in fourth

⁷²¹ Data courtesy of the Trust Law 2014, 2015, and 2016 pro bono indices, http://news.trust.org/spotlight/TrustLaw_Index_of_Pro_Bono/.

⁷²² See Trust Law pro bono indices, http://news.trust.org/spotlight/TrustLaw_Index_of_Pro_Bono/.

place). It stands to reason that the offices where full-time pro bono staff are based will likely be the offices where the highest volume of pro bono work is carried out.⁷²³

As for Brussels, it is less clear. There are two possible explanations. One reason might be the overlap of Big Law Pro Bono with the pro deo system run by the Belgian bars. This system requires young Belgian lawyers to take on pro deo cases for indigent individuals as part of their qualification process; it could be that firms are including pro deo hours in the pro bono hours totals. Another possible explanation is the very large non-profit population based there. The EU Transparency Register, which records all organizations active in influencing EU policy, reveals that there are over 500 non-profits with head offices in Belgium. The legal needs survey (which I carried out) of 100 of these non-profits revealed that over 50% of these non-profits are actively making use of pro bono.⁷²⁴

Figure 7⁷²⁵

European offices of 21 firms ranked by respective Pro Bono counsel in order of highest average engagement with pro bono in the period 2014 to 2016.

Rank	City	Weighted Score out of 21
1.	London	15.50
2.	Brussels	14.17
3.	Budapest	14.00
4.	Warsaw	13.25
5.	Paris	12.80
6.	Amsterdam	12.67
7.	Rome	12.25
8.	Munich	12.00
9.	Moscow	12.00
10.	Madrid	11.75

⁷²³ This is confirmed by 2018 findings from the UK which demonstrate a positive correlation between the number of full-time pro bono staff and the number of pro bono hours carried out across a firm. Collaborative plan statistics for 2018 (on file with author).

⁷²⁴ These results can be extrapolated to the entire population of 500 with a margin of error at +/- 9% at a confidence level of 95%. Khadar et al., *Good Lobby Legal Needs Survey*.

⁷²⁵ Khadar, *PILnet Anonymous European Pro Bono Survey*.

2.1.2 Architecture

By architecture, I refer to the internal architecture of Big Law Pro Bono in Europe. I carried out a survey among 21 of the largest international firms in relation to their European pro bono practices. The results (see tables directly below – Figure 8 and Figure 9), reveal that the architecture of pro bono in Europe is patchy, although it appears to be moving along a similar trajectory to the United States. Despite the relative youth of pro bono practice in Europe, certain indicators do reveal a degree of institutionalization:

- i. Three quarters of the firms have pro bono policy in place that is applicable to Europe (although in many cases this is likely to be a firm-wide policy). So perhaps the more interesting statistic is that one quarter of the firms has no pro bono policy applicable to Europe. For comparison, 96% of firms surveyed by Cummings and Rhode in 2009 had a pro bono policy applicable to their US pro bono work.⁷²⁶
- ii. Over half of the firms have at least one pro bono committee dedicated specifically to Europe. For comparison, 93% of firms surveyed by Cummings and Rhode had a pro bono committee applicable to US pro bono work.⁷²⁷
- iii. Just over a third have designated pro bono coordinators in their European offices, i.e. not full-time lawyers but fee-earners engaging in voluntary pro bono matter coordination. (By contrast 69% of firms surveyed by Cummings and Rhode had centralized channels for the distribution of their US pro bono matters.)⁷²⁸
- iv. Most notable is that just four firms have full time pro bono managers in continental Europe, while there are roughly 30 in the UK (in London) and over 200 globally as of 2018 (although mainly in New York, DC and Chicago).⁷²⁹ For comparison, 61% of firms surveyed by Cummings and Rhode had full time pro bono managers to manage their US pro bono practices.⁷³⁰

⁷²⁶ Cummings and Rhode, “Managing pro bono,” 2386-87.

⁷²⁷ Ibid.

⁷²⁸ Ibid.

⁷²⁹ See <https://www.apbco.org/about/membership/> for the latest figures in terms of the total number of full-time pro bono lawyers in the US.

⁷³⁰ Cummings and Rhode, “Managing pro bono,” 2382.

- v. One indication of institutionalization is the fact that over half of the surveyed firms linked pro bono to performance reviews in their European offices and just under half to bonuses. This was 82% and 76% respectively in the US study.

The picture this collectively paints, is of a weak institutionalization of pro bono within European offices. What little institutionalization there is mainly seems to stem from global pro bono mandates flowing from New York, DC and London. There are a number of reasons why firms might have an interest in spreading pro bono culture in their international offices. Firstly, firm pro bono policies (like policies on time recording, training and professional development or bonuses) are typically global or regional in nature and so demanding lawyers in London to do pro bono, but not lawyers in Paris, simply does not make sense within the logic of Big Law. Secondly, firms often view pro bono as a tool for firm integration (i.e. brining lawyers in different offices into contact with one another or creating a sense of shared values). Thirdly, from 2014, American Lawyer magazine began ranking firms for the “international pro bono” (beyond the US) which undoubtedly creates an incentive for firms to develop pro bono internationally also.⁷³¹

Ultimately, there does appear to be a trickle-down effect, which means that pro bono culture reaches (Continental) Europe in dribs and drabs. Beyond the local pro bono coordinators – who are simultaneously full-time fee earners – there does not yet appear to be any significant motive power forcefully driving pro bono practice within the Continental European offices themselves, although the growing number of full-time pro bono managers in Continental Europe will likely change this in coming years.

⁷³¹ Goldhaber, Michael, “A New Yardstick for International Pro Bono,” *The American Lawyer*, June 30, 2014.

Figure 8⁷³²

Degree of institutionalization of pro bono practice in Europe (*among 21 international firms*)

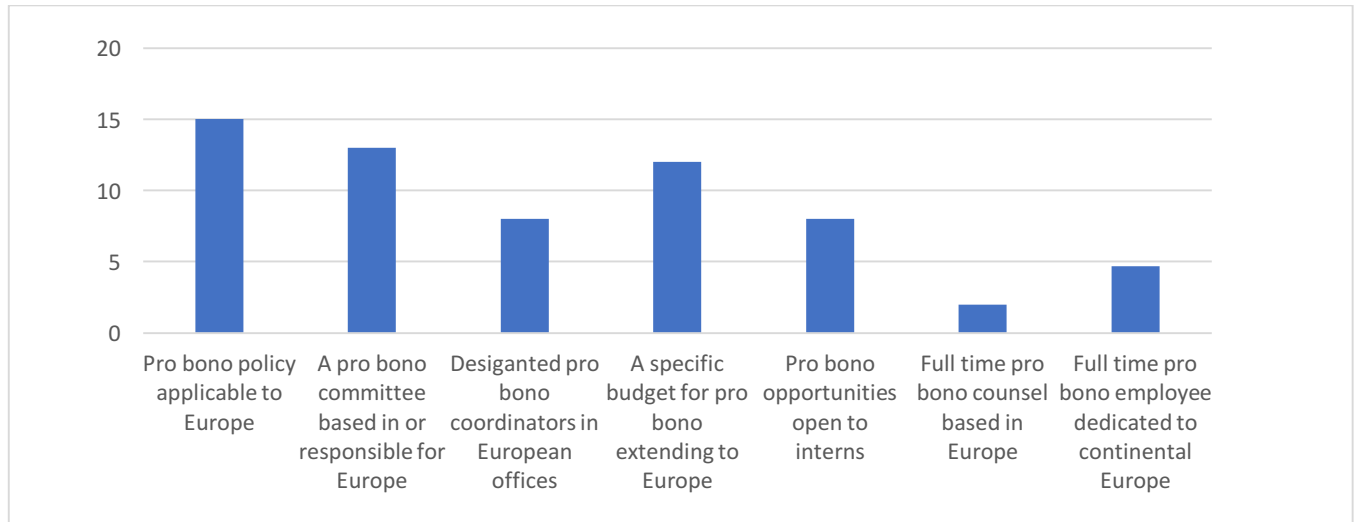
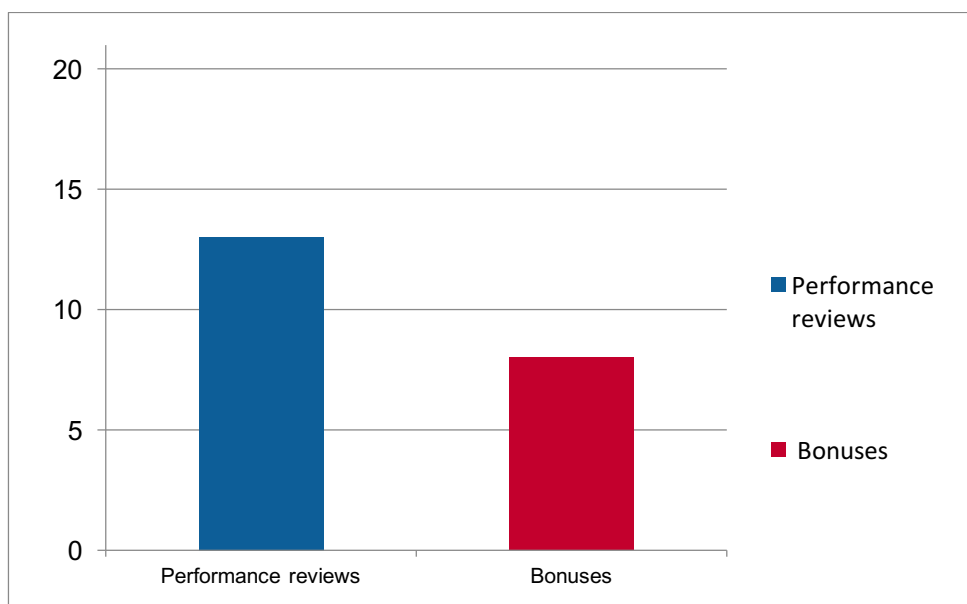


Figure 9⁷³³

Whether pro bono in Europe is linked to performance reviews or bonuses (*among 21 international firms*)



⁷³² Khadar, *PILnet Anonymous European Pro Bono Survey*.

⁷³³ Ibid.

2.1.3 Financial model

As in the US, the financial model of Big Law Pro Bono in Europe is that pro bono is generally underwritten by the firm. That is to say, fee-earning lawyers are expected to do pro bono work during their regular working hours and as such, they are effectively paid for this time. While many firms have aspirational targets (typically of between 10 to 35 pro bono hours per year) it does not seem to be the case that many have caps in place (although caps may exist with respect to the number of pro bono hours that can be counted towards billable hours targets and bonuses).⁷³⁴

In terms of the total overall spending on pro bono, a few things need to be considered. On the one hand, as already pointed out, firms have pro bono budgets, portions of which would be reserved for Europe. As in the US, there is no transparency around what the budgets are and it is possible that, even internally, many firms do not divide up their pro bono budgets by region (or even by office). It might also be the case that pro bono spending comes out of a larger CSR or responsible business budget. In any case, it has not been possible to get a sense of the average size of such budgets for Europe. An estimate, based on anecdotal evidence, would suggest that European pro bono budgets could range anywhere from €20,000 (where a firm has no full-time pro bono staff) to hundreds of thousands or even millions of Euros (including staff costs, where a firm has several Europe-based pro bono staff).

Beyond the actual pro bono budget, we must also take account of the value of lawyer time spent on pro bono work. If we assume an average hourly rate of a junior lawyer at a top firm of €400 per hour and we take, as above, 7000 pro bono hours per year as the average for a firm with 500 European lawyers, then we are in the region of €2.8 million per firm per year. If we take just the top 30 firms (as indicated by the Trust Law Pro Bono Index), we are in the region of €85 million worth of pro bono work per year. That is likely a very conservative estimate considering that DLA Piper alone carried out approximately €7 million worth of pro bono work in 2017 in Continental Europe alone (and another €10 million in the UK). A rough estimate based on 2016 figures from *American Lawyer* magazine would suggest that the US figures would be three to four times higher than these European figures.⁷³⁵

⁷³⁴ Dentons Europe, for example, has a cap of forty hours in this respect.

⁷³⁵ The top 200 firms carried out over five million hours of global pro bono in 2016. If we assume that at least four million of that was domestic pro bono, then the top thirty firms would have carried out around 600,000 hours, equivalent to 20,000 hours each, compared to 7,000 in Europe.

2.1.4 Professionals

Echoing findings from the US, my interviews with lawyers involved in Big Law Pro Bono in Europe revealed the importance of full-time pro bono roles.⁷³⁶ They form the link between the pro bono client base and the firm's lawyers (the pro bono resource). They generate and facilitate all pro bono work and they promote and entrench pro bono culture and practice within the firm and beyond.

As already noted, full-time pro bono roles are few and far between in Europe. Compared to the 150 or so full-time pro bono lawyers in the US, there are approximately 30 full-time pro bono lawyers based in the UK (London) and six based in continental Europe (Paris, Amsterdam, Brussels, Budapest, Frankfurt and Madrid). Interestingly, all of the firms that have full-time pro bono managers on the Continent (with the exception of one, being Freshfields) are Swiss Verien structure law firms. This might not be a coincident. Such firms are enormous, in terms of the sheer number of lawyers and offices, have highly decentralized power structures and are deeply multi-cultural (in a mosaic rather than melting-pot fashion). This means several things in the pro bono context. Firstly, it means that implementing pro bono programs from afar (New York or even London) is near impossible. Building pro bono culture and getting buy-in for pro bono from thousands of local lawyers (in scores of offices) who are: a) culturally homogenous and thus naturally more conservative; and b) essentially not answerable to Partners and law firm managers outside of their local office, is incredibly challenging. Secondly, it means that law firm integration (any policies and programs – such as pro bono– that tend to create a sense of firm values, culture or identity or that bring lawyers from different offices into contact with one another), is highly valued by firm leadership. The former point would create a genuine need for full time pro bono managers located in the Continent who are closer to the action, understand the local culture and law and can mediate between the UK/US and Europe. The second point enhances the business case for pro bono managers in Swiss Verien firms.

As noted, the survey among 21 pro bono counsel revealed that, of those firms that did employ full-time pro bono lawyers, the top locations in which those lawyers were based were: New York (8 firms); Washington DC and London (6 firms); Chicago (4 firms); Sydney (3 firms); San Francisco and Melbourne (2 firms); Paris and Hong Kong (1 firm). Although the survey is

⁷³⁶ Cummings and Rhode, "Managing pro bono," 2376.

not fully representative for the global firm population, it is highly likely that this pattern is representative of Big Law Pro Bono more broadly in so far as New York, DC and London are the global pro bono capitals (where many firms are headquartered) and outside of London, Europe hosts only a handful. This pattern is significant in so far as the location of full time pro bono staff is likely to impact how effective they can be in promoting pro bono in overseas offices. We will explore this further in the next Chapter.

Accordingly, across Continental Europe, those with responsibility for pro bono management are typically either full-time fee earners doing pro bono in their spare time or full-time CSR, marketing or business development professionals⁷³⁷ mandated to coordinate pro bono as part of their duties. Additionally, those firms with full-time pro bono roles in London will typically expect those personnel to take responsibility for pro bono practice across the whole of Europe. The importance of full-time pro bono roles to the institutionalization of pro bono must be emphasized here. Full-time pro bono lawyers have the time to go out and drum up work. Like any practice area, work does not just materialize, it needs to be sourced, which requires setting up meetings with potential clients or organizations that refer clients to the firm. The interviews I carried out with several pro bono counsel underlined this point. Amanda Smith, Pro Bono Partner at Morgan Lewis, suggested that:

“Regardless of the underlying forces that led to the institutionalization of pro bono [in the US], one key ingredient – and there are very few firms that have been able to achieve any success in this area without it – is the professionalization of the pro bono counsel role. The presence of a full-time pro bono counsel is the single most important contributing factor to success.”⁷³⁸

This is confirmed by 2018 findings from the UK which demonstrate a positive correlation between the number of full time pro bono staff and the number of pro bono hours carried out across a firm.⁷³⁹

⁷³⁷ The previous pro bono coordinator for the Austrian firm Schoenherr was also a full-time PR and marketing manager.

⁷³⁸ Interview number 13, Oct. 5, 2015.

⁷³⁹ Collaborative plan statistics for 2018 (on file with author).

This is a process that is already underway in London, as one US Pro Bono Counsel reflected: “one of the biggest contributors to the growth of pro bono in countries in Europe is the fact that law firms have invested significant resources into full-time pro bono people [in London].”⁷⁴⁰ London based pro bono professionals have even begun to get together to organize training around pro bono management (the so-called “UKademy”, held annually).⁷⁴¹ In the US and Australia, while we do not find full-time pro bono roles in every city where law firms maintain offices, we find them in those larger cities where law firms are either headquartered or maintain a significant presence. If Europe were to follow this trajectory we could perhaps anticipate that in the coming years, in addition to London, we might find further full-time pro bono positions emerging in Paris, Brussels, Frankfurt, Amsterdam, Moscow or Milan (a strategy already being pursued by several firms as discussed above). It seems likely that the institution of full-time pro bono lawyers is likely to have a rationalizing impact on pro bono practice in Europe; rendering it more systematized and predictable in terms of quality output, as it has done in the United States. These “generalist” pro bono managers would likely perform a similar role to their counterparts in the US; sourcing opportunities for their lawyers, managing relationships with non-profit clients and partners, structuring collaborations and generally being advocates for pro bono culture within their respective firms and beyond by seeking further institutionalization.

2.2 Recipients and the nature of the work

Who are the pro bono recipients in Europe? Who are the beneficiaries of Big Law Pro Bono? There are a wide range of recipients including: individuals, non-profit entities, corporate foundations, social investment funds, small and medium sized social enterprises, academic institutions and groups, public benefit institutions (e.g. UN agencies and international organizations) and even countries and government departments (typically developing and transitional countries).

However, it seems that the overwhelming majority of pro bono recipients from Big Law in Europe are non-profit organizations. Asked to estimate the approximate distribution of pro bono work between non-profit clients and individual clients (most law firms do not record such data), surveyed pro bono counsel (from the 21 firms) revealed an average ratio of

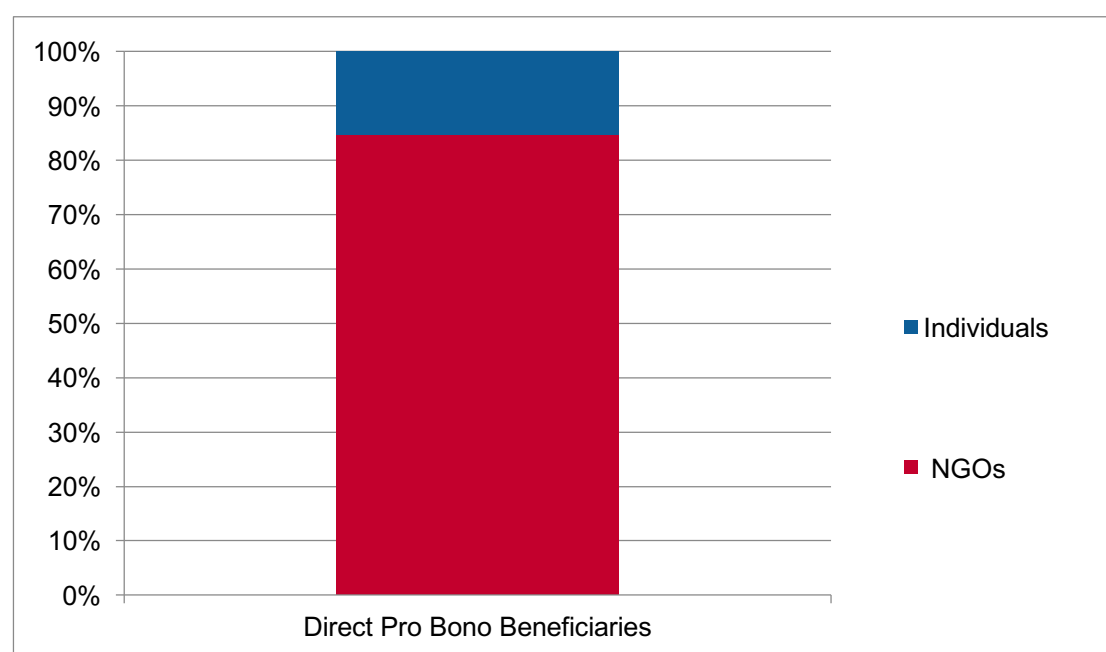
⁷⁴⁰ Interview number 43, June 16, 2016.

⁷⁴¹ Interview number 33, May 17, 2016.

approximately 85% of pro bono work carried out for non-profits (including work for social enterprises and public benefit institutions) and 15% for individuals (see Figure 10 below).⁷⁴² Considering that DLA Piper, (which arguably has the most developed individual client pro bono practice in Europe) only carried out 3% of pro bono work for individual clients in continental Europe in 2017 (and 15% in the UK), it is likely that the true balance may be even more skewed towards non-profit clients.⁷⁴³ Moreover, virtually all of the interview subjects for this research shared the view that pro bono clients in Europe were almost exclusively non-profit organizations. By comparison, in the UK, members of the “Collaborative Plan” (an initiative of nearly 40 of the largest City-based firms aimed at improving access to justice (defined narrowly) through pro bono in the UK), recorded just 27% of pro bono work for individuals, as opposed to non-profits, in 2018.⁷⁴⁴

Figure 10⁷⁴⁵

Who are the direct beneficiaries of pro bono in Europe (*average among 21 international firms*)



⁷⁴² This ratio was supported by law firm interviewees, most of whom confirmed that the overwhelming majority of their pro bono work was carried out for non-profits.

⁷⁴³ DLA Piper 2017 Pro Bono Report for Mainland Europe (on file with author).

⁷⁴⁴ Collaborative plan statistics for 2018 (on file with author).

⁷⁴⁵ Khadar, *PILnet Anonymous European Pro Bono Survey*.

The reasons for this ratio will be explored in the following chapter. For now it will be sufficient simply to note that this is the case.

An exploration of the range of work carried out may help shed further light on the type of recipients and the relationships between firms and recipients.

2.2.1 Work for individuals

The pro bono work that is carried out for individuals by Big Law in Europe is fully consistent with the models of pro bono that have existed in Europe for centuries. On the one hand, lawyers at commercial firms provide, on an ad hoc basis, legal information, advice and representation to disadvantaged or needy individual clients. This can include anything from work on issues such as family reunification or welfare benefits to education or employment discrimination.⁷⁴⁶ On the other hand, some firms employ more organized models. For example, Simmons & Simmons employed a qualified social welfare lawyer, to run a “social welfare clinic” for them in London. The clinic was set up in 2015 to provide “end-to-end” appeals stage support to social welfare claimants.⁷⁴⁷ Simmons & Simmons were apparently concerned about the restrictions on access to justice following the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and the impact that had vis-à-vis removing areas of law from the scope of legal aid. In its first year of operation the clinic took on 47 cases and won £90,000 in backdated benefits for clients. The full-time pro bono lawyer trains and supervises the full-time fee-earners engaged in the work of the clinic.

Such individual legal support “clinics” are also often run in collaboration with non-profit clients. For example, DLA Piper collaborates with the European Citizens’ Action Service (ECAS) to provide advice on EU free movement law to EU citizens and their third country national family members, and also with the Italian Refugee Council to provide assistance to asylum seekers in Milan and Rome. Meanwhile Herbert Smith Freehills collaborates with the Asylum Support Housing Advice Centre (ASHA) to provide support with asylum appeals in London.⁷⁴⁸ These clinics work by relying on the partner non-profits to refer cases to the firm

⁷⁴⁶ Interview number 30, Mar. 25, 2016.

⁷⁴⁷ Interview number 44, June 17, 2016.

⁷⁴⁸ Collaborative Plan Specialist Clinic Fact Sheet (on file with author).

and the pro bono managers to distribute the cases to fee-earners who work on them on a voluntary basis.

In total, firms run approximately 25 of these specialist individual support clinics in the UK.⁷⁴⁹ There are no figures for continental Europe, but the amount is likely far fewer (given that there are just four full-time pro bono lawyers across the continent). DLA Piper, which has two full-time pro bono lawyers in mainland Europe runs just three (in Belgium, Italy and Poland). Consequently, the likely contribution of Big Law Pro Bono to individual client support in Europe, beyond the UK (and even including the UK), is likely insignificant.

2.2.2 Work for NGOs

Lawyers in Europe, as elsewhere in the world, have likely been privately carrying out legal work for local sporting clubs, choirs and animal charities for decades, so Big Law in Europe provides legal assistance, on an ad hoc basis, to non-profits across Europe today. However, it is on a scale and degree of sophistication that has never been seen in Europe.

Firstly, in terms of the volume, if we take the above conservative estimate of about 200,000 hours or €85 million worth of pro bono work per year across Europe and we take for granted that up to 85% of this will be carried out for non-profits, then we are looking at 170,000 pro bono hours and almost €70 million worth of work per year. This is perhaps the equivalent of a 100-lawyer firm working full-time on pro bono for European non-profits.

Thinking next about the volume of clients served, although no comparable data was retrievable, PILnet (one of the largest international non-profits working to refer other non-profits to the pro bono departments of Big Law firms) referred matters from over 100 non-profits in 2013, while DLA Piper worked with over 200 non-profits across Europe in 2017. Therefore, if we take just the top 30 firms (as indicated by the Trust Law Pro Bono Index) and we assume each firm works with at least 50 non-profits across all of their European offices in a given year, possibly up to 1500 non-profits across Europe are recipients of Big Law Pro Bono in any given year. It would not be outlandish to call this a small industry.

⁷⁴⁹ Collaborative Plan Specialist Clinic Fact Sheet (on file with author).

In terms of the types of work that are carried out for non-profits, this is varied but typically falls into two buckets:

- 1) **Research:** research, typically of a comparative nature, forms the large bulk of pro bono work carried out by Big Law. Such research may cover any number of topics from environmental law or asylum and human rights law to the law related to non-profit governance. One non-profit, Advocates for International Development (A4ID) has started to maintain an online database to house such resources.⁷⁵⁰ European non-profits with an advocacy orientation will often need to understand what the law in relation to X topic is in multiple jurisdictions to effectively engage with European public institutions (the European Commission, the European Parliament, the Council of Europe). They typically do not have the resources to undertake such research themselves or to commission such research, and Big Law pro bono appears to fill a legitimate demand.

The interviews undertaken for the purpose of this chapter suggest that legal research - the production of research memos, comparative research reports, etc. - forms a very large part of the pro bono work that goes on across Europe. Lending support to this anecdotal evidence, a survey carried out among 100 non-profits listed in the European Transparency Register revealed that just under 80% of them were interested in receiving (or had received) pro bono “legal research” assistance.⁷⁵¹ This made legal research the most popular form of pro bono legal assistance by a margin of over 15% (followed by “governance/corporate”).⁷⁵² Such research may serve multiple purposes for non-profit clients; it may help them to make stronger legal arguments in their advocacy before national or international public bodies, tribunals, and institutions; it may give a non-profit credibility, “show that they are serious about an issue”; it may provide an independent and objective review of a legal issue, improving a non-profit’s decision making. Says one non-profit employee: “If you are breaking your head with a problem, ... it has some legal aspects but you do not know how to handle it, you go to a law firm and you see how they would handle it.”⁷⁵³

⁷⁵⁰ See <http://www.a4id.org/learning/resources/>.

⁷⁵¹ Khadar et al., *Good Lobby Legal Needs Survey*.

⁷⁵² Ibid.

⁷⁵³ Interview numbers 36 (June 13, 2016) and 47 (June 22, 2016).

In recent years, pro bono legal research has contributed towards some noteworthy non-profit advocacy campaigns. For example, law firms worked alongside Georgian civil rights non-profit, *Identoba*, which was involved in litigation and advocacy to remove a prohibition on gay men donating blood in Georgia. The law firms undertook extensive pro bono legal research into case law from other jurisdictions and the European Court of Human Rights (ECtHR) to supplement the legal argumentation for the litigation and provide a comparative perspective. The litigation to which the research gave support was successful, resulting in the striking down of the ban by Georgia's Constitutional Court in 2014.⁷⁵⁴ Another example is the work of Clifford Chance with Fair Trials International. Over 250 hours of multi-jurisdictional research carried out by some 28 lawyers across 18 of Clifford Chance's European offices into breaches of Articles 5 and 6 of the ECHR contributed to the development of three EU directives on the right to translation and interpretation, the right to information during criminal proceedings, and the right to access to a lawyer and communication with a consular official or nominated person. The added value of law firms is significant. Although firms may not have expertise in the relevant areas of law, when it comes to carrying out discrete, well-defined research tasks, law firm lawyers are very well trained. The fact that firms can do this across multiple jurisdictions and language barriers is significant. Non-profits would otherwise need to identify and pay for local consultants. Law firms can also bring other resources to bear. For example, Clifford Chance also provides ongoing funding to Fair Trials through the Clifford Chance Foundation (and provided funding of £90,000 over three years to support this specific advocacy campaign) and became involved in follow-up work, including amicus interventions and supporting strategic litigation to, amongst other things, ensure that the directives were correctly implemented in jurisdictions across the EU.⁷⁵⁵

⁷⁵⁴ Londa Beria, "Constitutional Court in Georgia lifts ban on homosexuals giving blood," *Democracy & Freedom Watch*, July 19, 2014, <http://dfwatch.net/constitutional-court-in-georgia-lifts-ban-on-homosexuals-giving-blood-10117-26435>.

⁷⁵⁵ See https://www.fairtrials.org/wp-content/uploads/140423_Cierny-v-Slovakia_Website.pdf; and <https://www.cliffordchance.com/news/news/2014/11/clifford-chance-wins-european-award-for-partnership-in-the-publi.html>.

Some examples taken from a guide prepared by PILnet for NGOs on the use of its Global Clearinghouse may illustrate further:⁷⁵⁶

- “A group of pro bono lawyers gathered research on laws governing squatting in a number of European countries. This information was used to bolster the campaign of an arts NGO advocating for a law permitting the use of derelict buildings for community arts space in Hungary.”
- “In order to strengthen gender equality in Croatia, a human rights NGO partnered up with two leading law firms to look into the implementation of the E.U. Equal Treatment Directive. By examining the approach of other E.U. countries in transposing the directive, the NGO was better equipped to make concrete proposals for improving the gender equality framework in Croatia.”
- “A disability rights organization received an analysis of Swedish laws on guardianship (a model of best practice) from a team of pro bono lawyers. This analysis was used to inform proposals for legislative amendments in Hungary, Slovakia, and the Czech Republic.”
- “When the existing legal framework proved insufficient to protect victims of domestic slavery in France, one NGO looked to pro bono lawyers to help draft proposals to amend the law. These proposals were ultimately used to strengthen the protection available.”

Firms often team up in such research projects, typically to increase their jurisdictional reach, but sometimes simply for practical reasons, to ensure proper staffing of a project, depending on the lawyers and expertise that are available within firms at a given time for the relevant work.

- 2) **Corporate support:** the second large category of Big Law Pro Bono work in Europe consists of so-called “corporate support” for non-profits. This includes anything from support with contracts (partnership and funding agreements, employment contracts, leases, technology and telecommunication supply agreements) to intellectual property

⁷⁵⁶ See http://www.pilnet.org/component/docman/doc_download/1-guidelines-for-ngos-how-to-summarize-your-legal-needs.html.

(brand protection, licensing agreements) and governance (incorporation, board structure).

Importantly though, corporate support need not always be mundane and can be quite creative, for example, US law firm Orrick, which has worked with a French non-profit called Planet Finance (now Positive Planet) to provide microfinance in continental Europe, spreading capital to low-income individuals attempting to start small businesses.⁷⁵⁷ Orrick lawyers were involved in crafting innovative financing transactions that were entirely new to the French legal system.⁷⁵⁸ In the words of Rene Kathawala, Orrick's Pro Bono Counsel:

“That is the best kind of pro bono in my view, doing sophisticated pro bono work that is delivering real benefits to low-income people, using the skills we have for an NGO that without our support couldn't do it... I am always an advocate for meeting the needs of poor people as much as we can but I also believe that our law firms are not necessarily in the best position to do [that] ... if we can be leaders in pro bono matters that benefit tens of thousands or even hundreds of thousands of people based on the transactional expertise we have, and we do those pro bono matters very efficiently, and we can do them at scale and in significant numbers, then we are doing as much if not more than if we do the individual [case] for low-income individuals... We have certain expertise that we should tap into for our pro bono practice”.⁷⁵⁹

Beyond research and corporate support, there is a range of other forms of pro bono work that Big Law carries out for non-profit clients:

- **Training:** commercial lawyers frequently run trainings for non-profit clients across Europe, for example, in relation to contract drafting and negotiation, lobbying, written & oral advocacy, intellectual property rights and even sometimes human rights or UN

⁷⁵⁷ See <http://www.positiveplanet.ngo/en/project/entrepreneurship-in-suburban-areas/>.

⁷⁵⁸ Interview number 43, June 16, 2016.

⁷⁵⁹ Ibid.

engagement. For example, DLA Piper recently ran a training on intellectual property for Transparency International Berlin.⁷⁶⁰

- **Evidence gathering, fact finding and monitoring:** pro bono work for non-profits also sometimes involves monitoring (for example monitoring case law databases for new jurisprudence or trial monitoring in cases against human rights defenders), and evidence gathering or fact finding (for example interviewing asylum seekers to identify practical barriers to access to justice in relation to asylum applications).⁷⁶¹
- **Drafting:** Occasionally, non-profits will have already done all the research for a report that they wish to draft and they will simply hand the research over to a commercial law firm and have them draft the report.
- **Lobbying and legal and policy advocacy:** lobbying and political advocacy are not common pro bono assignments for commercial law firms as they typically prefer to avoid taking public positions on sensitive political issues. However, in relation to less sensitive issues, e.g. child rights, such work can be carried out. Where the nature of the advocacy is more legal than political, firms are also much more willing to get involved. For example, firms do a large amount of work facilitating non-profits to make submissions to UN Treaty Bodies and Human Rights Courts.⁷⁶²

However, my research revealed that relationships between non-profits and law firms are not always smooth. In particular, confusion stems from the full-time pro bono role in Europe and the nature of the relationship between that role and the (non-profit) clients. Is the pro bono professional a gatekeeper, a facilitator or an activist? There seems to be much disagreement within the pro bono community about this and much confusion and, sometimes, even frustration among clients. In the words of one non-profit director:

⁷⁶⁰ The author attended and participated in trainings on lobbying and legal advocacy for the UN World Food Programme in Paris and Inclusion Europe in Brussels.

⁷⁶¹ See, for example, https://www.academia.edu/34262854/ACCESS_TO_JUSTICE_AND_THE_RIGHT_TO_EDUCATION_FOR_CHILDREN_WITH_DISABILITIES_A_REPORT_EXPLORING_BARRIERS_TO_ACCESS_TO_JUSTICE_IN_THE_CONTEXT_OF_INCLUSIVE_EDUCATION_IN_TEN_EUROPEAN_COUNTRIES.

⁷⁶² Discussion with Emily Christie, Senior Pro Bono Associate at DLA Piper.

“Law firms have very different ways of doing pro bono, different ways of organizing pro bono. This can confound NGOs. In some cases you may have access to the lawyers who are actually doing the work, in others the PB managers or coordinators may act as a barrier, which can frustrate things. It can be very difficult to work out how to make progress with that kind of role... there is a real difficulty where you have teams or coordinators that are very corporate and unable to understand the needs of the pro bono client.”⁷⁶³

Interviews with non-profits indicate that very often what the non-profits would prefer is a direct relationship with a handful of lawyers who know and understand their work. Intermediaries of any kind, who do not fully grasp the non-profits, can be perceived as gatekeepers who complicate rather than facilitate lawyer-client relationships. Non-profits find it particularly frustrating where pro bono managers appear to be screening or interviewing them, looking for a particular kind of client or project:

“[P]ro bono coordinators... have an idea of the perfect pro bono project, which often does not line up with the needs of the NGO... NGOs feel like they are pitching something to them that they need to accept rather than them wanting to know how they could assist...”⁷⁶⁴

This can be concerning when it manifests as an arbitrary preference for certain kinds of work and complete disinterest (or worse) in others:

“Law firm pro bono remains at the whim of [pro bono managers] or the head of CSR... Such that each law firm will have a different interest. One may decide we like cats, the other migrants, and the next children... Priorities seem random.”⁷⁶⁵

Indeed, some causes are not popular. Examples were provided to the author, during the course of the research, of non-profit workers having conversations with European lawyers during the course of which disparaging remarks were made about certain causes (such as Roma rights or migrants’ rights).

⁷⁶³ Interview number 39, June 14, 2016.

⁷⁶⁴ Interview number 48, June 23, 2016.

⁷⁶⁵ Interview number 39, June 14, 2016.

On the other hand, non-profit clients also see great value in the pro bono manager role, *especially* where the pro bono professionals have some understanding of the work of the non-profit. In the words of one non-profit director, “quality is key... there is a need for pro bono coordinators, but having coordinators that have a human rights or international law background and can read through what fee-earners have done and operate as a quality control mechanism, is crucial.”⁷⁶⁶ Indeed, there are those pro bono professionals who intimately understand their non-profit clients. In the view of one non-profit employee, some pro bono managers function more as “undercover NGO agent[s] [and] many even used to work for NGOs.”⁷⁶⁷ The non-profits respond positively to this, often feeling as though they have a fellow activist who understands and believes in their work, but with access to significant resources, which can be powerfully brought to bear on their advocacy.

Overall, non-profit interviewees did seem to appreciate the central importance of the pro bono manager role as a “facilitator” mediating between the non-profit and law firm, despite their confusion surrounding the exact nature of the role and where loyalties lie. It seems that non-profits feel that, in particular, those professionals who see their primary function as CSR, centering on the needs of the firm rather than social justice lawyering in the public interest, are sometimes difficult to comprehend.

2.2.3 Work for private sector entities and the role of the CSR movement in Europe

In addition to working for individuals and non-profits, a smaller amount of pro bono work is increasingly carried out for various kinds of private sector entities including corporate foundations (e.g. the NIKE Foundation), social enterprises (i.e. small and medium sized for-profit companies with a social purpose) and social investment funds (e.g. the Rabobank Foundation Rural Fund). Again, the variety of work carried out for such entities can be broad. A couple of examples may illustrate.

In Amsterdam, DLA Piper has a collaboration with the Amsterdam Impact Hub, which is a so-called “incubator” for social-purpose start-ups. For example, one of DLA’s clients, African Clean Energy, is a medium-sized social enterprise that produces portable solar biomass cook

⁷⁶⁶ Ibid.

⁷⁶⁷ Interview number 4, Sept. 25, 2015.

stoves. The cook stoves are sold throughout Africa and South East Asia and reduce environmentally harmful smoke emissions that would otherwise be caused by people cooking on open fires. Through this program, social enterprises like this, members of the Impact Hub, are referred to DLA Piper for legal support. Typically, such support relates to questions of governance, contracts, financing and intellectual property.⁷⁶⁸

In Europe, there is somewhat of a social enterprise movement underway with incubators, like the Amsterdam Impact Hub, in most capital cities across the continent and a flourishing of the social enterprise business model.⁷⁶⁹ Big Law Pro Bono is increasingly turning to social enterprises as an exciting new client base. In some respects, they make ideal clients in that the needs they have are very similar to those of traditional commercial clients, although on a much smaller scale. As such, working for these clients makes excellent training for younger lawyers. Another driver for engagement with such organizations is building expertise in emerging areas of law (e.g. related to new technologies such as blockchain). However, developing new paying clients from such relationships is rare. Most social enterprises (there are exceptions) do not make for very good paying clients, insofar as they are simply too small and cash poor for it to make sense for major international firms to engage with them on a paying basis.

In addition to working for social enterprises, commercial law firms in Europe also sometimes work for corporate foundations and social impact funds. Such work might involve, for example, reviewing or drafting loan documentation for social impact funds investing in sustainable businesses in the developing world.

It is, perhaps, worth briefly reflecting here on the role of the CSR movement on Big Law Pro Bono in Europe. Given the significant impact of this movement on Big Law Pro Bono in London (as discussed above), one would expect it to have a similar impact on the Continent. However, in the opinion of the author, while the impact is beginning to be felt, CSR is not *yet* a primary driver for the development of Big Law Pro Bono in Continental Europe.

The CSR agenda took off in Europe at around the same time that Big Law Pro Bono was getting underway in the UK. Between the years 1990 and 2000, CSR organizations and networks (often

⁷⁶⁸ Interview number 30, Mar. 25, 2016.

⁷⁶⁹ Toivonen, "Social innovation community," 49–73; Vandon et al., "What does it take to support a change maker?"

modeled after Business in the Community) were established all across Europe, beginning in the East (Czech Republic and Bulgaria) and then moving gradually towards the West (Germany Italy and France).⁷⁷⁰ The EU announced its intention to develop policies on corporate social responsibility with the 2001 publication of a Green Paper “Promoting a European Framework for Corporate Social Responsibility.”⁷⁷¹ By the year 2007, virtually every country in Europe had a CSR association of some kind, linking large companies to work collaboratively on CSR initiatives in the relevant country.⁷⁷² Beyond this, a number of other global developments have bolstered the CSR movement in Europe in ways that have had an impact on Big Law. The momentum for information gathering and disclosure about non-financial social impacts as part of corporate social responsibility has accelerated in recent years, as reflected in a growing number of regulatory and voluntary standard-setting efforts, including the OECD Guidelines for Multinational Enterprises (1976), the ILO Tri-partite Declaration of Principles Concerning Multinational Enterprises and Social Policy (1977), the UN Global Compact (2000), the ISO 26000 Guidance Standards on Social Responsibility (2002), the UN Guiding Principles on Business and Human Rights (2011), the EU directive on the disclosure of non-financial and diversity information by large (state owned and publicly listed) corporations (Directive 2014/95/EU), independent benchmarking systems such as the Global Reporting Initiative and (at the domestic level) the UK Anti-Slavery Act (2015) and the French Law on Corporate Vigilance (2017).⁷⁷³ All of this has created a regulatory and policy environment in which large multinational corporations (especially publicly listed corporations) are required to take corporate social responsibility much more seriously.

However, despite such developments, the link between Big Law Pro Bono in Continental Europe and the CSR movement (and the growth in CSR and human rights reporting) seems tenuous. As has been explored above, and will be explored further in the next Chapter, the development of Big Law Pro Bono in Europe has been driven by law firm internationalization, pro bono institutionalization and, most significantly, a handful of key stakeholders from within the global firms themselves and European civil society (organizations linked to the European

⁷⁷⁰ Kinderman, “Re-Embedding or Dis-Embedding the Corporation?,” 27.

⁷⁷¹ COM(2001) 366 final Green Paper Promoting a European framework for Corporate Social Responsibility.

⁷⁷² Kinderman, “Re-Embedding or Dis-Embedding the Corporation?,” 28.

⁷⁷³ Warhurst, “Future roles of business in society,” 157; Methven O'Brien and Dhanarajan, “The corporate responsibility to respect human rights,” 555.

public interest law movement explored in Chapter 3). Research undertaken for this thesis has not identified any significant links between these key actors and the European CSR movement.

The only identifiable link between the CSR movement and Big Law Pro Bono in Europe relates to law firm business development activities. All the above described developments related to CSR and CSR reporting have led to corporations gradually seeking to promote corporate social responsibility norms throughout their supply chains (largely thanks to the retail, food and beverage and extractives sectors which have notoriously been implicated in human rights violations in their supply chains),⁷⁷⁴ inevitably also reaching suppliers of legal services (in a generic and untargeted manner). Increasingly, when corporations publish requests for proposals (for legal services, as for any other goods or services) they request information about firms' respect for international human rights standards, environmental sustainability practices, transparency and corruption policies, diversity statistics and labor standards (i.e. reflecting the emerging norm systems described above). However, it is still very rare (insofar as the author is aware) that a company will directly ask about a firm's *European* pro bono practice. What more frequently happens, is that law firms in Europe respond to such requests (which are typically not very well suited to law firms and have been designed with other service providers in mind) by providing information on their pro bono practice (sometimes instead of the information requested). But this is little more than a marketing sleight of hand and it does not seem likely that there is any major direct causal relationship between such requests (which are a relatively recent phenomenon in Europe) and the emergence of Big Law Pro Bono in Europe.

The other loose way in which the CSR agenda may have played some role in Big Law Pro Bono development in Europe is simply by having created a favorable background context against which European commercial lawyers, being asked to engage in pro bono, could understand the request. In other words, as lawyers became more aware of CSR through their largest corporate clients (who would have been involved in many of the European CSR platforms), the idea of Big Law Pro Bono might have seemed less alien to them (as Big Law's response to the CSR movement). However, given the rich history of legal volunteering in Europe (described in Chapter 3) and the strong Big Law Pro Bono movements in the US and the UK, there are other, perhaps more obvious, frameworks from within which requests do pro

⁷⁷⁴ Baumann-Pauly, Nolan, Van Heerden, and Samway. "Industry-specific multi-stakeholder initiatives that govern corporate human rights standards," 771.

bono could be understood by European commercial lawyers. In any event, future research might shed more light on the links between Big Law Pro Bono in Europe and the European CSR movement.

2.2.4 Work for academic institutions

Work for academic institutions typically involves engaging lawyers in supervising law students at university law clinics. Presently (over the past five or ten years), there is a rapidly expanding law clinic movement in Western Europe. Western European universities are turning to “clinical legal education” at an astonishing pace. A recent Open Society Justice Initiative survey suggests that there are 32 clinics in Germany alone (at separate universities), 5 in France, 4 in the Netherlands, 4 in Ireland, 3 in Spain and 21 in the United Kingdom (and there are likely many more than this).⁷⁷⁵ Considering that just ten or even five years ago these figures (certainly in continental Europe) would have been at or near zero, this is a significant increase. Moreover, networks of law clinics are emerging in France (*Réseau Francophone pour l'enseignement Clinique du Droit*) and Italy (*Rete Cliniche legali in Italia*), and at the pan-European level (European Network for Clinical Legal Education).

Law clinics involve themselves in many types of work, including direct support for individual clients, research for non-profit clients and institutional engagement such as the preparation of amicus briefs or ombudsman complaints.⁷⁷⁶ The role of commercial lawyers with respect to the clinics is to supervise the students, alongside their academic instructors, and ensure the quality of the end product.

2.2.5 Work for public benefit institutions

Another growing area of work for Big Law Pro Bono is work for public benefit institutions, for example, UN agencies such as the UNHCR, OHCHR and UNICEF. The nature of the work typically falls into one of the two large buckets mentioned above (comparative) research and corporate support. For example, DLA Piper has a commitment to undertake 5% of all pro bono work globally for UNICEF each year. In some respects, such institutions, along with very large

⁷⁷⁵ From records kept by the Open Society Justice Initiative.

⁷⁷⁶ See Alemanno and Khadar, *Reinventing Legal Education*, 1–26, 322–48.

multinational non-profits, make highly compatible pro bono clients for Big Law. In recent years, international law firms have developed “institutional client relationships” with multinational corporations. I.e. firms provide legal services across all aspects and all geographies of a corporation’s business. Firms have grown to match the geographical presence of their multinational clients to be able to effectively service them.⁷⁷⁷ For a client like UNICEF, DLA Piper can provide a similar service to the type of service it would provide for a large bank or a large retail company, assisting with everything from contracts to policy research on a global basis.

2.2.6 Work for countries and government departments

Another small but growing area of work is work for countries and government departments. For example, the non-profit, International Senior Lawyers Project, involved a number of lawyers (notably from Hogan Lovells) in supporting the government of Liberia to negotiate or renegotiate natural resource concession agreements, mineral development agreements, and investment contracts aimed at securing a better deal for Liberia.⁷⁷⁸ Another good example of this kind of work would be Herbert Smith Freehills’ Fair Deal Sierra Leone Programme, which has resulted in HSF providing over £1.5 million of pro bono legal advice to the Government of Sierra Leone as part of a legal assistance facility accessible to Sierra Leone government officials (particularly those involved in attracting and supporting inward investment into the country).⁷⁷⁹ The project was brokered in collaboration with the non-profit, Africa Governance Initiative. A final example comes from DLA Piper who have had a full-time pro bono lawyer seconded to the governments of Timor-Leste and Vanuatu for several years now. The lawyers work in the justice departments of the respective governments and help to review and draft legislation along with local employees.⁷⁸⁰

⁷⁷⁷ Interview number 29, Mar. 1, 2016.

⁷⁷⁸ See <http://www.hoganlovellsafrica.com/africa-pro-bono-work>.

⁷⁷⁹ See <http://www.herbertsmithfreehills.com/news/news20111201-hs-launches-free-legal-assistance-facility-for-the-government-of-sierra-leone> and <http://www.herbertsmithfreehills.com/news/news20141112-gavin-davies-and-rebecca-perlman-recognised-for-contribution-in-sl>.

⁷⁸⁰ Interview number 29, Mar. 1, 2016.

2.3 Intermediaries (clearinghouses)

It is important here to mention “clearinghouses” (or referral organizations).⁷⁸¹ Clearinghouses are non-profit organizations whose core purpose is to connect Big Law with non-profits or individuals in need of legal services. They generate and typically scope pro bono matters from non-profits and then match those matters with commercial law firms. As noted in Chapter 1 and above, the existing literature on these organizations is sparse and does not shed an awful lot of light on how and why they are formed and how they operate. What is known about them is that in the US they are typically subsidized by local bar organizations and are primarily focused on connecting law firm volunteers to low-income clients.⁷⁸² They may get involved to a greater or lesser degree in educating clients about the availability of pro bono services, screening pro bono requests from individual clients, liaising directly with full-time pro bono staff, training law firm lawyers and helping to troubleshoot where issues arise in lawyer-client relationships.⁷⁸³ They can be small one-person operations or large complex organizations and they exist across every US state.⁷⁸⁴ However, many questions remain unanswered: how closely do they work with law firms, to what extent do they have power to set the agenda of law firm pro bono, to what extent do they engage in advocacy vis-à-vis the law firms or the law firm clients, how involved do they get in the matchmaking process, to what extent do they specialize as law firms are specializing?⁷⁸⁵

My research into these organizations in Europe revealed that they play a very significant role in mediating pro bono relationships between Big Law and non-profit clients in continental Europe. The survey among 21 firms revealed that nearly 50% of all pro bono work carried out by the firms on the Continent, was being sourced through clearinghouses (see Figure 11, below).

⁷⁸¹ Findings in this section stem primarily from several interviews with clearinghouse managers: Interview numbers: 2 (Sept. 18, 2015), 4 (Sept. 25, 2015), 8 (Oct. 1, 2015), 11 (Oct. 8, 2015), 14 (Oct. 20, 2015), 15 (Oct. 20, 2015), 21 (Nov. 24, 2015), 23 (Dec. 2, 2015), 26 (Jan. 26, 2016), 28 (Feb. 8, 2016), 31 (May 12, 2016), 34 (May 30, 2016), 38 (June 14, 2016), 41 (June 15, 2016), 42 (June 16, 2016), 49 (June 23, 2016) and 50 (June 24, 2016).

⁷⁸² Cummings, “Politics of pro bono,” 42.

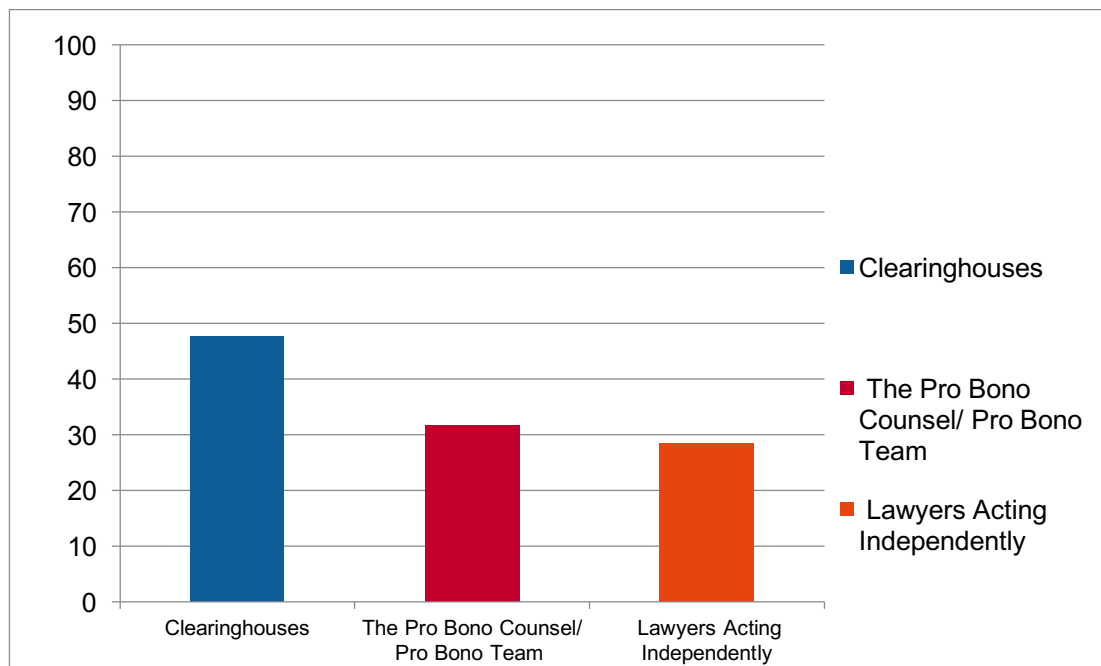
⁷⁸³ Ibid.

⁷⁸⁴ Ibid.

⁷⁸⁵ For a detailed analysis of Australian referral organizations see Hunt and Burchell, “From conservatism to activism,” 8.

Figure 11⁷⁸⁶

How pro bono in Europe is sourced (*average percentage breakdown among 21 international firms*)



There are now domestic clearinghouses all across Europe. In addition to this there are several international clearinghouses based in London and New York (see timeline in Figure 12 below). With the exception of the international clearinghouses (e.g. PILnet, TrustLaw, A4ID) most clearinghouses only have a handful of staff (between 1 and 4). Although all clearinghouses essentially perform the same task, i.e. connecting law firms with pro bono clients and pro bono projects, the approaches they take to this task, their funding models and what they consider as part of their natural mandate vary considerably. While some clearinghouses will have been purpose-built as pro bono organizations (such as Pro Bono Connect in the Netherlands or Law Works and A4ID in the UK), more frequently, they will be offshoots from pre-existing organizations, taking their character, model and mission from those pre-existing institutions. For example, they may have emerged from or been inspired by grant-making foundations or resource organizations that cater to civil society (such as PILnet, the Civil Society Development Foundation in Romania or Proboneo in Germany), or they might have emerged from corporate foundations or foundations catering to university law clinics (such as TrustLaw

⁷⁸⁶ Khadar, *PILnet Anonymous European Pro Bono Survey*.

or Centrum Pro Bono in Poland) or perhaps from broad domestic public interest law organizations (such as PILA in Ireland or the Ukrainian Pro Bono Clearinghouse).

Nevertheless, virtually all clearinghouses, almost without exception, spend the first several years of their existence investing most of their energy into matchmaking and “market making”. In other words, building a market for pro bono by recruiting both law firms and non-profits to the cause and then matching firms with non-profits and non-profit projects. I refer exclusively to non-profits here not by accident, because, unlike their American cousins (discussed in Chapters 1 and 3), European clearinghouses cater almost exclusively to non-profit clients. Of the nine clearinghouses and quasi-clearinghouses operating in continental Europe (four international and five domestic)⁷⁸⁷ whose staff were interviewed and the several others investigated for the purposes of this thesis, virtually all focused primarily or exclusively on catering to non-profit clients on the demand side.

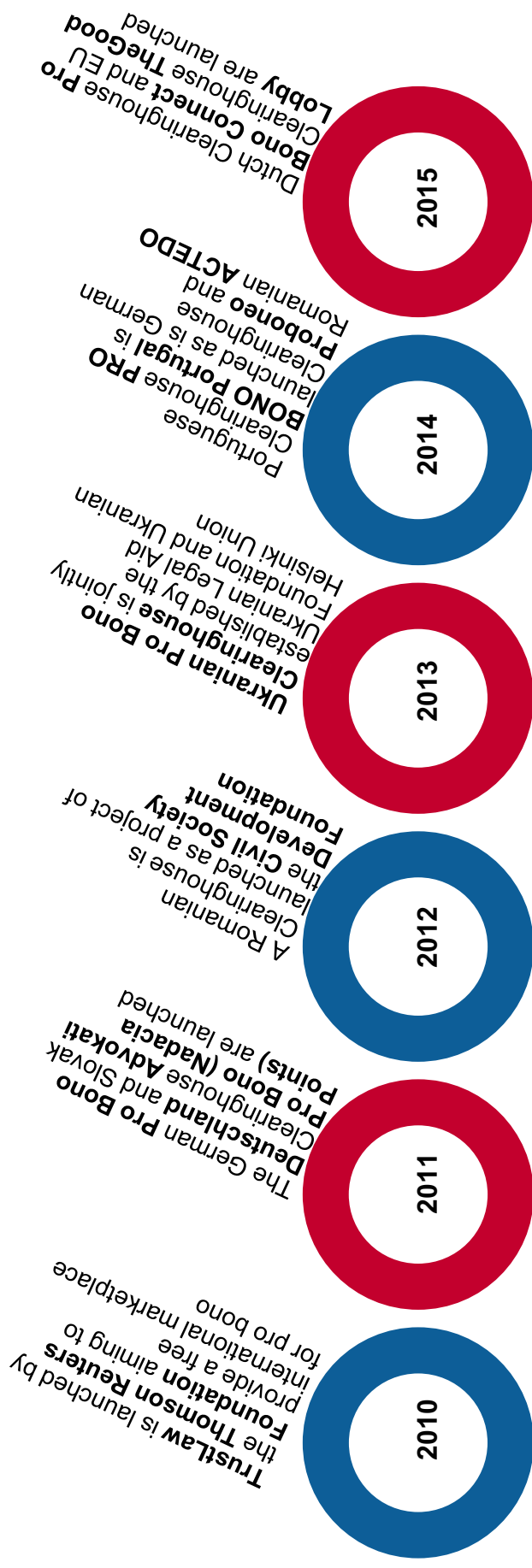
When it comes to the type of non-profit work catered for, clearinghouses can take very contrasting approaches. For example, while Trust Law focuses largely on the governance and other operational legal needs of non-profits, PILnet focuses on more programmatic and human rights work for non-profits. At the domestic level, approaches also vary. While clearinghouses in Poland, Germany and Romania (i.e. the Civil Society Development Foundation) largely prioritized such operational needs, clearinghouses in France and Hungary (PILnet) focused overwhelmingly on human rights work. Yet others, such as PILA in Ireland took an incredibly varied approach.

⁷⁸⁷ PILnet, Trust Law, PBI, A4ID, Centrum Pro Bono, PILA, AAHD, Proboneo and Civil Society Development Foundation.

Figure 12

Clearinghouse development timeline (although note that PILnet only started to operate as a clearinghouse in 2006)





Beyond this, clearinghouses tend to capitalize on the pre-existing networks and skill-sets of their founders and host organizations. This “pre-history” and “start-up capital” of clearinghouses feeds into their mission and self-identification. For example, while Trust Law has been able to exploit the market-making and journalistic powerhouse that is Thomson Reuters (producing powerful exposé-like pro bono legal reports shedding light on new issues such as sex trafficking or domestic workers), PILnet (as will be discussed further in the following Chapter) has been able to take advantage of its large network of civil society organizations and public interest law advocates across Central and Eastern Europe (enabling it to rapidly scale up a pan-European clearinghouse movement by tapping into civil society across the continent). This has been equally true at the domestic level where, for instance, Centrum Pro Bono was built on the extensive relationships of its founders with the Polish legal establishment (allowing it to establish a highly prestigious annual pro bono award bringing together Poland’s legal elites) and AADH (the French domestic clearinghouse) on the experience of its founder with international human rights law (aiding it to engage firms in cutting-edge human rights work related, for example, to child trafficking). PILA is a project of the network of Free Legal Advice Centres (FLAC), which emerged during the law reform movement in the 1970s. (It was founded in 1969.) FLAC is thus oriented towards the provision of free legal services to low-income individuals (promoting access to justice defined both narrowly and more widely) and this likely accounts for the fact that PILA is one of the few clearinghouses in Europe that caters for individual clients. Similarly, Pro Bono Connect, in the Netherlands, is a project of the Dutch Commission of Jurists for Human Rights (NJCM) and this likely accounts for the fact that Pro Bono Connect has been largely focused on catering for human rights organizations.

Funding models are also varied. While several rely heavily or even exclusively on law firm charitable donations (such as PILnet), others charge membership fees to law firms and or NGO clients (such as A4ID, AADH and Pro Bono Connect) while others receive foundation grants or are even operated as corporate foundations (such as TrustLaw). Based on interviews with several clearinghouse managers, a few trends can be noted. Firstly, there seems to be a trend towards reliance on the law firms themselves for funding. This has been most likely caused by the fact that, as will be discussed below and in the following Chapter, PILnet (and PILnet staff) have been instrumental in establishing many of these clearinghouses, and on many occasions, have helped conceptualize their operating model, sometimes even directly making the business case to law firms for financially supporting such domestic clearinghouses. Another trend,

observed by the author, is the saturation of the clearinghouse market. Law firms seem unlikely to support more than one clearinghouse in any given European country. Moreover, now that they are paying fees for multiple (perhaps up to ten) clearinghouses across Europe (typically at least €5000 per year) and are increasing their ability to source pro work themselves, they seem unlikely to continue paying for new clearinghouses.

In the following pages, the chapter will focus on some of the work being done by European clearinghouses.

2.3.1 Culture building and institutionalization: creating a supportive pro bono environment

Many clearinghouses have incorporated into their mission the broader goal of promoting pro bono culture within the legal profession and seeking the institutionalization of pro bono in various ways. Often this has been a necessary part of their core mandate in so far as it has formed a crucial part of the market-making process. For PILnet, this has certainly been the case. PILnet has adopted a catalytic approach aimed at sensitizing both non-profits and law firms to the potential benefits of pro bono by organizing roundtables and the “European Pro Bono Forum” (an annual conference for pro bono lawyers and non-profits in Europe). They have identified and nurtured “local pro bono champions” to carry the pro bono torch and spread the culture in various countries across Europe.⁷⁸⁸

They have faced many challenges in this respect, from resistance to the culture of talking about “doing good” (many Europeans apparently believe that charitable work should be done but not talked about publicly) to resistance to the perception that Big Law Pro Bono is a US imposition.⁷⁸⁹

They have been required to develop narratives and strategies to overcome such cultural obstacles. For example, by securing buy-in from the legal establishment (high courts, justice ministers, ombudsmen, etc.), by building a sense of pride and prestige around Big Law Pro Bono work through the establishment of the European Pro Bono Award, and by identifying precursors to pro bono in European legal practice and using them to counteract the idea the pro

⁷⁸⁸ Interview numbers 14 and 15, Oct. 20, 2015.

⁷⁸⁹ Interview number 4, Sept. 25, 2015.

bono is an American tradition.⁷⁹⁰ Beyond this, they have also done much to pursue institutionalization by negotiating “pro bono declarations” (definitions of and commitments towards pro bono) signed by law firms and other key players in the legal establishment of relevant jurisdictions and by helping to establish other clearinghouses through knowledge sharing (e.g. producing pro bono manuals) and training. As will be explored further in the following Chapter, their efforts at institutionalization have also sometimes meant seeking compromises with various national Bars and justice ministries, for example vis-à-vis:

- the exclusion of individual representation from the definition of pro bono (for example in the Czech Republic, Italy and Germany);
- exemptions for pro bono in relation to the prohibition of lawyers to advertise (for example in Poland and Italy);
- exemptions for pro bono in relation to the prohibition of lawyers to provide free legal services (for example in Germany and Romania); and
- exemptions for pro bono from VAT rules related to service provision (for example in Hungary and Poland).⁷⁹¹

Such culture-building, community building and institutionalization strategies have also been embraced by several of the national clearinghouses that PILnet has helped to found. For example, Centrum Pro Bono in Poland developed the first pro bono award in Europe.⁷⁹² A leading Polish newspaper sponsors the award, launched in 2003, and its jury members have included the ombudsman, the Minister of Justice, the head of the Supreme Court, the head of the Constitutional Court and the head of the Polish Bar. Meanwhile, PILA in Ireland has successfully advocated for the inclusion of a term in all government procurement contracts that any firm who secures such a contract has to give back 5% (of the value of the contract) in pro bono and CSR contributions.⁷⁹³ The Civil Society Development Foundation, in Romania, has managed to place pro bono in the strategy of the ministry of justice for the development of justice in order to exert pressure on the Romanian Bar to take a favorable position on pro bono and have also managed to lobby to include pro bono or public interest litigation in some of the donor grants they manage for civil society organizations (e.g. they have managed to support

⁷⁹⁰ Interview number 50, June 24, 2016.

⁷⁹¹ Examples taken from interview number 4, Sept. 25, 2015.

⁷⁹² Interview number 49, June 23, 2016.

⁷⁹³ Interview number 34, May 30, 2016.

around 100 separate legal claims related to human rights and anti-discrimination via an EEA grant scheme they manage).⁷⁹⁴

2.3.2 Automated match-making and “intelligent matchmaking”

Clearinghouses are increasingly making use of technology to upgrade the rather analogue system of matchmaking that has been in place for several years. Trust Law was a pioneer in this regard, seeking at its founding to inject technology into the pro bono landscape and so revolutionize it. Jim Jones, Board Chair of the Pro Bono Institute, assisted Monique Villa, CEO of the Thomson Reuters Foundation, to develop the initial idea for Trust Law. He recalls a conversation in Minnesota in 2009 that led to the development of the initial idea:

“What we came up with was the original kernel of the idea which became Trust Law...a combination of a very smart application of technology with a matching program to try and bring lawyers and law firms together with significant NGOs and social enterprise organizations.”⁷⁹⁵

Ed Rekosh, founder and former CEO of PILnet, was consulted by Villa at the time and recalls that Trust Law wanted to be a “virtual operator”:⁷⁹⁶

“What she was pitching was making a market using [Thomson Reuters] strengths in information technology and market making. Her concept was just to be that connection point; she had a PowerPoint slide of a switchboard operator...”⁷⁹⁷

Villa planned to have a very small tech-savvy team based in London that would operate an online platform that could automatically connect non-profits and law firms across the globe. Ultimately, the dream proved hard to realize. Although the platform was built, non-profits needed much more coaching and their requests needed to be carefully scoped by a lawyer before a law firm could engage with them.⁷⁹⁸ As one Trust Law employee later reflected:

⁷⁹⁴ Interview number 38, June 14, 2016.

⁷⁹⁵ Interview number 28, Feb. 8, 2016.

⁷⁹⁶ Interview number 11, Oct. 8, 2015.

⁷⁹⁷ PFC Social Impact Advisors, Saïd Business School, University of Oxford, and Thomson Reuters Foundation, “Case Study on Trust Law: How the Thomson Reuters Foundation Built the World’s Largest Pro Bono Legal Network to Serve the Poor,” 2014, 9.

⁷⁹⁸ *Ibid.*, 10–13.

“At the end of the day, the [online] platform is just a tool for our staff to facilitate the service, but it’s our staff, their expertise, that are the key part of the service.”⁷⁹⁹

Other clearinghouses have also experimented with technology to facilitate their matchmaking. For example, Centrum Pro Bono in Poland has also developed an on-line platform. Non-profits members can visit their webpage and complete a form with a request. This request is then reviewed by the pro bono coordinator of Centrum Pro Bono who, after some back and forth and revision, will formally accept the request. Once a request has been accepted, any law firm member, by logging in to the member area of the website, can see the request (and browse others) and select it to take the project forward.⁸⁰⁰ Again, the system does not work perfectly and law firms do not always login frequently, such that the coordinator must also send the firms a weekly newsletter with all accepted matters (i.e. the traditional “analogue” approach to matchmaking).

Beyond technology, another approach that is being taken to improve matchmaking, perhaps moving in the opposite direction, is what has been labelled as “intelligent matchmaking”.⁸⁰¹ The Good Lobby is an EU law and policy focused clearinghouse that seeks to match the large number of typically Brussels based EU advocacy non-profits with the Brussels based international legal community and the EU law academic community. The Good Lobby leverages on the insight of its founders and a network of academics and legal professionals to identify pro bono volunteers with the right expertise for specific non-profit projects. For example, in a project related to fracking for Food & Water Europe, The Good Lobby reached out to its network to identify a postdoctoral researcher and a PhD student based in Belgium, an academic based in France and a lawyer based in London, all with extensive knowledge and expertise in relation to EU energy law, to develop a toolkit on EU law for local fracking campaigners across Europe.⁸⁰²

⁷⁹⁹ Ibid., 13.

⁸⁰⁰ Interview number 49, June 23, 2016.

⁸⁰¹ Discussion with Alberto Alemanno and Lamin Khadar, co-founders of The Good Lobby.

⁸⁰² See <https://www.foodandwatereurope.org/reports/food-water-europes-hydrocarbon-toolkit/>.

2.3.3 Coalition building, thought leadership and agenda setting: using pro bono to connect the dots in the public interest landscape or push boundaries and break conventions

A number of clearinghouses across Europe are beginning to take real initiative by questioning the received wisdom of what purpose clearinghouses should serve and what pro bono means as a form of progressive legal activism.

The international clearinghouses and pro bono organizations such as PILnet, Trust Law, ISLP, PBI and A4ID and the Vance Center are all beginning, in different ways, to embrace a thought leadership role in relation to pro bono. For instance, A4ID seeks to “increasingly move towards being a thought leader” with respect to the role of law in the developing world and the business and human rights movement.⁸⁰³ They do so in part via organizing training sessions for the legal community around various business and human rights themes as relevant to developing economies. Meanwhile, Trust Law seeks to become a “think tank around pro bono”, for example, by identifying ways in which law firms can use pro bono to improve the position of women around the world, from domestic workers to sex trafficking victims.⁸⁰⁴ They do so by enlisting the help of firms and producing detailed investigative reports exploring issues that may not have been legally analyzed before. In addition, they hold trainings on social enterprise and impact investment for lawyers in the hope of linking up the pro bono movement with those movements. ISLP, for its part, is focusing on sustainable development, and has produced a number of reports analyzing issues around the social, humanitarian and environmental impact of investment into the developing world.⁸⁰⁵

Meanwhile at the national level, clearinghouses are also beginning to take leadership roles in one way or another.

One method being embraced by clearinghouses is coalition building. Clearinghouses bring together various actors (lawyers, academics, students, non-profits, politicians, public officials and journalists) to work on particular advocacy campaigns. In many respects this is a natural extension of the clearinghouse matchmaking function. However, extending this function beyond the traditional lawyer-non-profit dichotomy is an interesting and noteworthy

⁸⁰³ Interview number 24, Dec. 14, 2015.

⁸⁰⁴ Interview number 23, Dec. 2, 2015.

⁸⁰⁵ See <http://www.islp.org/content/research-reports>.

development in Europe. For instance, the EU clearinghouse, The Good Lobby, often brings together senior academics, students and legal professionals, both to work on its pro bono projects and to deliver joint training sessions for non-profits (e.g. on lobbying and advocacy) and also for pro bono matchmaking sessions (or “hackathons”).⁸⁰⁶ The HEC-NYU EU Public Interest Clinic, the sister organization of The Good Lobby, has even brought together journalists at Politico Europe to work with law students, a handful of professors and a blogger to work on a project aimed at exposing a lack of transparency in the EU judicial system.⁸⁰⁷

Meanwhile, PILA, the Irish clearinghouse, builds law reform working groups comprised of lawyers (solicitors and barristers), several non-profits and academics to promote legislative reform in relation to specific issues.⁸⁰⁸ PILA sets the agenda, frames the issues at stake and then drives the process forward when energy is flagging. In this manner, they have worked on issues to do with housing policy, victims’ rights and energy efficiency in private homes.⁸⁰⁹

An interesting question is, at what point do such organizations stop being simply clearinghouses and become instead non-profit advocacy groups in their own right, with their own mission? There is no simple answer to this question. The research carried out suggests that it likely depends upon a range of factors including: the mandate of the organization as expressed in its articles of associations (some organizations such as Pro Bono Centrum in Poland are prohibited from engaging in “political” activity); the pre-history of the organization or the organizational context out of which the clearinghouse has emerged (i.e. the extent to which an organization had a separate existence and separate mandate prior to becoming a clearinghouse or taking on an additional mandate as a clearinghouse); the qualifications and backgrounds of the clearinghouse staff (e.g. whether they are non-profit advocates, policy experts or commercial lawyers); and the profile of the leaders of such organizations (their particular expertise and whether they see themselves as advocates of particular causes).

⁸⁰⁶ See <http://www.thegoodlobby.eu>.

⁸⁰⁷ Clinic project, 2016 (on file with author).

⁸⁰⁸ See, for example, <http://www.pila.ie/resources/case-studies/housing-policy-working-group-collective-complaint/>.

⁸⁰⁹ See <http://www.pila.ie/resources/case-studies.html>.

3 Conclusion

In this Chapter, we have explored the process by which Big Law Pro Bono has begun to emerge in Europe, by way of its institutionalization in the US and London and the emergence of a global corporate bar and a professional class of pro bono managers with mandates to spread pro bono culture across the increasing number of international offices. We have also sketched the shape of Big Law Pro Bono in Europe, which is one of weak institutionalization, mimicking many of the features of pro bono in the US, however, with at least one major difference, the virtually exclusive non-profit client base both from the point of view of the firms and the clearinghouses.

Taking just the top 30 law firms, the European Big Law Pro Bono industry likely involves more than 5000 lawyers (perhaps 120 full time equivalents) doing some €85 million worth of pro bono work per year spanning the entire continent from Moscow to London. While some 1500 non-profit clients may benefit from this work, likely less than 15% of this work (possibly much less) is focused on access to justice, as defined in the existing pro bono literature and within US pro bono circles (i.e. direct access to justice for individual clients). Moreover, there has emerged an entire infrastructure, operating both internationally and nationally, to connect Big Law with non-profits spread across the Continent, with virtually no focus on the provision of legal services to low-income individuals. At first glance this seems odd, given that, as explored in Chapter 2, the singular objective that tied together the various models of pro bono engaged in by the European legal professions over the centuries, has been precisely to secure access to justice for individuals.

How could this be, that Big Law Pro Bono in Europe has developed with such a strong focus on servicing non-profit organizations and a very limited focus on promoting direct individual access to justice? And if Big Law Pro Bono in Europe is not directly promoting access to justice for individuals, is it still contributing towards access to justice? And if so how? The remainder of the thesis will seek to answer these questions.

CHAPTER 5 – Big Law Pro Bono in Search of Demand and Ideology: An Investigation of Why Big Law Pro Bono Has Taken a Unique Shape in Europe

In the first chapter of this thesis we noted that Big Law Pro Bono traces its origins to the United States and to progressive legal movements of the 1960s and 1970s and suggested that, as such, it must be understood as a fundamentally American construct. However, it was suggested that, unlike other forms of progressive lawyering (or “cause lawyering”) emerging out of this period, Big Law Pro Bono is ideologically indeterminate. That is to say that Big Law Pro Bono can best be understood as a resource, defined not by any ideology or politics, but by a commitment to provide technical expertise, at no cost, to clients who otherwise would not have access to such expertise. This is significant, for the purposes of the present chapter, because it means that Big Law Pro Bono, when being deployed in any particular context (i.e. in a new jurisdiction/region) will not necessarily be oriented towards any particular social cause or policy or political objective.

In Chapter 1, it was further suggested that, more than just being politically and ideologically indeterminate, Big Law Pro Bono is also historically and politically contingent. This implies that the prevailing historical and political context within which the pro bono resource is deployed will play a fundamental role in determining how the pro bono resource is oriented.

In Chapters 1, 2 and 4, we have explored the influence of the poverty law movement, the decline in Federal funding for civil legal aid and the access to justice movement on the institutionalization of Big Law Pro Bono in the United States. Against this backdrop, Big Law Pro Bono began to be conceived of, by practitioners, advocates and commentators, as a solution to the perceived “justice gap” (vis-à-vis civil legal aid). As firms began to institutionalize pro bono, the resource was oriented functionally towards the provision of civil legal services to low-income individuals. Pressure was placed on firms to construct their pro bono practices in this manner by a range of actors including: intermediary organizations, law graduates, the organized bar and legal aid providers. This is significant because as will be further explored in this chapter, it likely means that where Big Law Pro Bono is transplanted to a new region or

jurisdiction, the prevailing historical and political context and the various local actors may equally play a role in determining how this resource is deployed and we should not necessarily expect that the results would be the same as in the United States. Indeed, in Chapter 1 it was suggested that whereas certain features of Big Law Pro Bono are likely to be context-transcending and present in any region or jurisdiction where Big Law Pro Bono is deployed, others are likely to be more context-specific and variable depending upon the specific location. Whether a feature falls into the former or the latter category likely depends upon whether that feature flows from the logic of Big Law itself (such as the structures, processes and hierarchies of large commercial law firms or the preferences of multinational corporate clients) or from the logic of the local legal market (such as local Bar regulations or the prevailing system for the provision of legal services to the poor).

In Chapter 3, we have noted that throughout European history, there has been a consistent and growing concern with access to justice, defined narrowly as the access of the poor and the needy to legal services and to procedures for administering justice. Access to justice, defined in this way, has been the major objective of pro bono practice throughout the ages in Europe. It was further suggested that, with the emergence of nation states and then the European social state, the obligation of ensuring access to justice gradually shifted from a charitable or professional duty of lawyers and the organized bar, towards a constitutionalized civic right, institutionalized in the form of state-funded legal aid systems. We also explored how novel models of social justice lawyering emerged in the late 20th Century, which both embraced and transcended conventional public service norms (neutrality, impartiality) that were implicit in much of the pro bono lawyering practice throughout European history, and fused them with both human rights frames and political and transgressive ideologies that had been cultivated in Soviet-era Central and Eastern Europe. Such models pursued the wide conception of access to justice (as defined in Chapter 2) insofar as they sought norm change, altering both the processes and outcomes of existing judicial mechanisms, and so redefining “justice” in favor of marginalized and underrepresented groups and social and political pariahs. It is hoped that all of this will provide useful context as we try and understand why it is that Big Law Pro Bono in Europe has developed in the way that it has.

In Chapter 4, we have explored the globalization of Big Law Pro Bono by tracing this process from its US origins through London and into Continental Europe. We explored how the emergence of a professional class of full-time pro bono managers and the internationalization

of commercial law firms inevitably brought Big Law Pro Bono to Europe in that large firms now had European offices and Pro Bono managers and policies that extended to Europe, amongst other locations. We also explored the shape of Big Law Pro Bono in Europe today, which is defined above all, both from the vantage point of law firms and referral organizations, by its almost singular focus on non-profit clients.

Having addressed the “how” and the “what” questions in Chapter 4, in this chapter the central objective is to analyze the “why” question through an exploration of the “localization” of Big Law Pro Bono. This will be done in two parts. In the first part (Section 1) we will explore why it is that Big Law Pro Bono in Europe is focused so single-mindedly on work for non-profit organizations. In the second part (Section 2) we will try to understand why, given the history of pro bono lawyering in Europe (explored in Chapter 3) and the way Big Law Pro Bono has come to be understood in the US (explored in Chapters 1, 2 and 4), there is virtually no observable focus on direct individual access to justice in the European variant of Big Law Pro Bono?

The analysis in this chapter will point to several possible answers to these questions, including: barriers to market access in Europe experienced by the initial Big Law Pro Bono entrepreneurs (i.e. full-time pro bono managers based in the US and the UK seeking to promote pro bono on the Continent); the unique profile and networks of those actors who initially developed the market for Big Law Pro Bono in Europe; the legacies of the European civil liberties, human rights and public interest law movements; the resistance of local bars to Big Law engaging in individual client work; the specificities of the type of law firms and lawyers that make up the European Corporate Bar; the relative ease of dealing with non-profit clients as opposed to individual clients; the functional distribution of labor between the Social Bars of Europe and the rest of the legal profession (and the Corporate Bar in particular); and the fact that the problem of individual access to justice (in Central and Eastern Europe) had, in the minds of many of the relevant stakeholders, already been largely solved by the time the market for Big Law Pro Bono was really taking shape on the Continent.

Among these factors, arguably the most significant are: firstly, the barriers to market access; secondly, the existence of a strong Social Bar in many European states (and the linked resistance from national Bars to developing Big Law Pro Bono in way that would undermine legal aid systems and undercut the market share of the Social Bar); and thirdly, the fact that the

key organization (PILnet) which helped to build the market for Big Law Pro Bono in Continental Europe, was deeply connected to the European NGO movement and, for historically contingent reasons, viewed the problem of access to justice for individuals (narrow definition) as a problem for the state to solve.

As was noted in Chapter 1, what appears as “globalization”, is often actually what Santos has called “globalized localism”, meaning “the process by which local phenomena are successfully globalized”.⁸¹⁰ This often turns out to be “Americanization” rather than globalization insofar as American models of law and legal practice are exported (and transplanted), along with a certain model of capitalism, to other parts of the world by businesses, law firms, foundations, development agencies etc.⁸¹¹ However, this is often a “thin globalization” insofar as there is a difference between *form* (the shape of legal institutions and legal models) and substance (the lived experience of legal institutions and legal practices) and imported norms and practices remain hybrid or contested below the veneer of uniformity.

As we shall see in this Chapter, in Continental Europe, the emergence of Big Law Pro Bono is largely a story of the export of an American legal practice (Big Law Pro Bono), but the story is not of an unmediated transplant. Preexisting local practice, legal institutions and legal actors (as explored in Chapter 3) filter American models such that they take on new meaning. Certain parts of the legal transplant may succeed and others may fail. Berkowitz, Pistor and Richard have suggested that key factors that may render legal transplants more likely to succeed include: when they are chosen voluntarily after consideration of alternative solutions; when there is affinity between the legal systems of the exporting and importing countries; when there is demand from the recipient country; when legal intermediaries are in position that understand the law and can adapt it to local conditions; and when institutional infrastructures is already in place.⁸¹² As we will explore below, understanding how these variables play out in the transplant of Big Law Pro Bono in Continental Europe helps to explain why Big Law Pro Bono ended so heavily focused on non-profit clients on the Continent. Of particular relevance here, is the role played by international and national elites (by reference e.g. to wealth, education, familial ties),

⁸¹⁰ Snyder, “Economic globalization and the law,” 626; Wilkins, Khanna and Trubek, eds. *The Indian Legal Profession in the Age of Globalization*, 8.

⁸¹¹ Ibid.

⁸¹² Berkowitz, Pistor, and Richard, “Economic development, legality, and the transplant effect”, Halliday and Osinsky, “Globalization of law”, 458.

in importing and exporting legal norms and building new legal practice sites and institutions.⁸¹³ As noted in Chapter 1, such elites use the process of importing and exporting legal norms to elevate and maintain their elite status in national and international hierarchies.⁸¹⁴ What is crucial to consider in this respect, however, is to consider how such elites are situated and what “capital” they can mobilize.⁸¹⁵ In other words, what are the incentives, capabilities and limitations of relevant elites, in differing social, political and legal contexts, when pursuing a transplant? What attributes do they have (networks, skill sets, resources) when pursuing a transplant? As we shall see, a consideration of such factors also sheds crucial light on the story of Big Law Pro Bono in Europe.

1 Market Barriers and Market Formation

In this section I will try to explore why it is that Big Law Pro Bono in Europe came to be so singularly focused on non-profit clients and, moreover, on a particular model of progressive lawyering that emerged from the European civil liberties, human rights and public interest law movements. In this analysis, I will be exploring, in more detail, the process by which Big Law Pro Bono has been transplanted on European soil. If Chapter 4 focused on the globalization of Big Law Pro, here I will focus on the localization of this resource. In doing so I make use of market and business terminology: “market barriers”, “market formation”, “demand and supply” and so on. I do so because I believe that unlike in the United States where Big Law Pro Bono emerged rather organically from progressive legal movements, in Europe it was intentionally transplanted and had to be “branded” and “marketed”. Therefore, I believe that the localization of Big Law Pro Bono in Europe can productively be understood in terms of market forces. Indeed, when “Big Law” itself arrived in Europe between the late 1980s and early 2000s, it brought with it a new and previously unheard-of resource, “Big Law Pro Bono”. With thousands of lawyers located in capital cities from London to Moscow and Amsterdam to Rome, and full-time Pro Bono Counsel based in the firms’ headquarters in New York, DC and, subsequently, London, mandated to spread pro bono culture across the firms’ international offices, the potential for this new resource was significant.

⁸¹³ See e.g. Dezalay and Garth, *The internationalization of palace wars*.

⁸¹⁴ Dezalay and Madsen, “The force of law and lawyers”, 439.

⁸¹⁵ Ibid. 447.

In this light, there is no question that when Big Law arrived in Europe, and US and London-based Pro Bono Counsel were looking to deploy this new resource, they were embarking upon a legal transplant. As noted in Chapter 2, Europe had a rich history of pro bono lawyering but no history of deploying lawyers who exclusively practice commercial law (a phenomenon almost as new as “Big Law” itself), more used to working for banks and energy companies, to that end (i.e. pro bono lawyering). This was a transplant, not of a legal instrument, or legal institution, but of a practice, or perhaps rather a service. The issue is that, typically, new services respond to new demands. As explored in the previous chapter, in the US, Big Law Pro Bono had emerged in response to the demand from junior lawyers to do public interest work and against the backdrop of the broader public interest law and poverty law movements. These movements had positioned lawyers as a crucial component of a large-scale public service project aimed at the creation of a more just and inclusive society, and insofar as pro bono was concerned, the promotion of access to justice, defined in terms of civil legal aid. Big Law Pro Bono was further institutionalized against a backdrop of declining civil legal aid funding and a desire of the organized bar to promote conservative notions of public service framed around traditional public service norms (i.e. public service as the provision of free legal services to low-income clients rather than as more transgressive strategies such as law reform and impact litigation). This had furthermore created a culture of both professionalized and grass roots civil society organizations that trusted lawyers, who were often ideologically in-sync with them, and were willing to work collectively to secure equal access to justice.

In Continental Europe, however, Big Law Pro Bono arrived as a result of internationalization in the global legal market, as but one part of the overall Big Law package. If Big Law Pro Bono was exported to Europe, lock, stock and barrel, with the export of Big Law more generally, then how could it be that the practice in Europe came to be so disinterested in access to justice (defined narrowly)? In contrast to its origins in the US, Big Law Pro Bono arrived in Continental Europe without any particular problem to solve, or any particular demand to respond to. It was a service in search of demand. Consequently, almost immediately, the Big Law Pro Bono entrepreneurs (i.e. the Pro Bono Counsel in the firms’ headquarters) encountered an obstacle. These were US commercial lawyers (or UK lawyers with very limited experience in pro bono management) looking to generate pro bono work in their Continental European offices. They didn’t speak the local languages, they had no links to possible pro bono recipients in, for example, Hungary, Spain or the Netherlands. They could not even be sure there was a demand for the service they were trying to “sell”. Where would they even begin?

1.1 Barriers to market access and the multi-armed bandit problem

One way of defining “barriers to market entry” is “anything that prevents an entrepreneur from instantaneously creating a new firm in a market”.⁸¹⁶ Meanwhile, the “multi-armed bandit problem”, in probability theory, is defined as a problem in which fixed or limited resources must be allocated among “several alternative (competing) projects” where the potential value of such projects is only partially understood and may become more understood with the passing of time or by actually allocating resources to the projects.⁸¹⁷ These concepts may be useful, in the following passages, to understand the challenges that the European Big Law Pro Bono entrepreneurs faced in developing pro bono practices in their continental European offices.

By the middle of the first decade of the 21st century, pro bono practice had been significantly institutionalized in the top 100 American firms and certainly in the top 10 or so English firms.⁸¹⁸ Moreover, by the early 2000s, the largest American and English law firms had a significant European footprint and an enormous pool of lawyers spread across Europe and indeed across the globe. As the Anglo-American law firms expanded globally, they sought to take their newly institutionalized pro bono practices with them. In the words of Suzie Turner (Partner and Chair of Dechert's firm-wide Pro Bono practice, talking in 2003), “our commitment to pro bono is global in nature...one firm, one commitment, one policy.”⁸¹⁹ Talking in 2015, she put it another way, “there is legal need in *all* jurisdictions, so to require pro bono in the US but not in Kazakhstan does not hold water.”⁸²⁰ This position is unsurprising if you consider the model of internationalization pursued by US firms (as discussed in Chapter 4), which typically involved sending US-trained and qualified lawyers to staff European offices that were managed from the US in accordance with US professional standards. This made it relatively easy for US law firms to export pro bono culture overseas (at least insofar as the lawyers were concerned – identifying clients would be an altogether separate challenge). In any event, as the American firms began to encourage lawyers in their foreign offices to uphold the pro bono commitments set in the US, British firms began to respond. Lovells was first to

⁸¹⁶ Carlton and Perloff, *Modern Industrial Organization*, 110.

⁸¹⁷ Mahajan and Teneketzis, “Multi-armed bandit problems,” 121–51.

⁸¹⁸ This, of course, says nothing about pro bono practice in other segments of the profession, such as sole practitioners and small and medium-sized firms that have also demonstrated a significant commitment to pro bono practice in both the US and the UK.

⁸¹⁹ M. Goldhaber, “A World of Good,” *American Lawyer* 34, no. 7, 2012.

⁸²⁰ Interview number 16, Oct. 21, 2015.

appoint a full-time pro bono manager position in 1997. This was followed by several appointments by British firms (Clifford Chance, Linklaters and Allen & Overy) and by 1999, six firms maintained full-time pro bono personnel in their London offices.⁸²¹

However, as the pro bono council from the American and London law firms began to promote pro bono practice within their Continental European offices, they encountered several significant problems. While, as discussed in Chapter 3, the legal professions of most European states had proud traditions of providing legal services to those in need, the idea of widespread institutionalized Big Law Pro Bono was novel (as was the emergence of Mega-Law practice on the continent), all of which caused some difficulty. These difficulties will be discussed throughout this chapter. For the time being, it will be sufficient to note that identifying suitable pro bono opportunities was proving incredibly difficult. In contrast to the US, there were no civil society organizations operating as “feeder organizations”/ “clearinghouses”, i.e. non-profits specifically set up to connect law firms with individuals.⁸²² In the words of Suzie Turner, “the hurdles were in finding sufficient numbers of pro bono matters for people to handle [...there was an] absence of infrastructure and an absence of NGO culture that was looking for and trusting pro bono”.⁸²³ James Windels (Co-chair of Davis Polk & Wardwell's pro bono committee) put it succinctly when he suggested (in 2003) that, “[t]here is no doubt that the [pro bono] infrastructure overseas continues to lag behind the infrastructure [in the US]”.⁸²⁴

Unlike the US, Europe had not benefited from public interest law and poverty law movements, building connections and trust between Big Law and civil society and rallying them behind a common objective and ideology. As discussed in Chapter 3, the introduction of state-sponsored legal aid systems across Europe had fostered the emergence of a Social Bar, i.e. those lawyers specialized in legal aid work (discussed further in Part 2 below). There was no expectation on commercial lawyers to do “legal aid” work (i.e. any legal work for low-income individuals). Meanwhile London, where attitudes to engaging Big Law in such access to justice oriented work were positively hostile, was serving as the base camp for promoting Big Law Pro Bono on the continent. This most probably influenced the framing of the objectives. Turner had organized a conference in London, already in 2001, in collaboration with the SPBG under the

⁸²¹ “Who is behind pro bono? As the director of the Solicitor’s Pro Bono Group resigns, Matheu Swallow asks where the group goes from here,” *Lawyer*, September 27, 1999, 14.

⁸²² Interview number 4, Sept. 25, 2015.

⁸²³ Interview number 16, Oct. 21, 2015.

⁸²⁴ M. Goldhaber, “A World of Good,” *American Lawyer* 34, no. 7, 2012.

name “Pro Bono across the Channel”.⁸²⁵ Within the next 3 or 4 years, Turner built a coalition of pro bono managers, including Felicity Kirk (then Director of Pro Bono at White & Case) and Florence Brocklesby (then Pro Bono Manager at Debevoise & Plimpton). The three of them (“the European Big Law Pro Bono entrepreneurs”, also affectionately referred to as “the midwives of European Pro Bono” by others in the movement) were single-mindedly determined to spread Big Law Pro Bono practice to mainland Europe. However, to do so, they were going to need to make some in-roads with local civil society organizations, with Social Bars, and with any potential recipients of Big Law Pro Bono services. Relying exclusively on their local lawyers was not realistic. Local lawyers were never going to “send 2000 emails out” to local civil society actors.⁸²⁶ In the words of Kirk, “not being on the ground in 25 jurisdictions was a big challenge” and “opportunities seemed to arise in an ad hoc manner [...] which is problematic if you want to develop things a bit more systematically”.⁸²⁷ It is also important to remember that they were aiming to promote, all at the same time, pro bono across several offices with several hundreds of lawyers spanning diverse jurisdictions and legal cultures. It was impossible to know which opportunities to pursue (i.e. which cities/offices and which civil society organization or lawyers to talk to, in order to generate pro bono requests). It was easy to go down one road, invest time, and discover that it would not generate any fruitful pro bono work.⁸²⁸ Moreover, the pro bono entrepreneurs were collectively sensitive to things “not being imposed”.⁸²⁹ They wanted Big Law Pro Bono to respond to genuine demands but encountered large resistance from local lawyers typically suggesting that “legal aid [in their country] was very comprehensive” or, alternatively, that “pro bono could not be done” in their country due to legal and regulatory obstacles. For example, they discovered that in Germany, providing free legal advice was prohibited by legal ethics law (although, German lawyers nevertheless historically provided charitable legal services on an *ad hoc* and “don’t ask, don’t tell basis”).⁸³⁰

The Big Law Pro Bono entrepreneurs were trying to bring a new service (Big Law Pro Bono) to a new market (Mainland Europe). However, they were based in the US and London, they did not speak local languages or have useful local contacts through which they might generate demand for their services. They had limited understanding of the local context and were

⁸²⁵ Interview number 16, Oct. 21, 2015.

⁸²⁶ *Ibid.*

⁸²⁷ Interview number 17, Nov. 3, 2015.

⁸²⁸ *Ibid.*

⁸²⁹ *Ibid.*

⁸³⁰ Mayer Brown LLP, *Pro Bono Update*, Spring 2008, 21.

cautious of creating a backlash by failing to be sufficiently sensitive to that context. They could not even be sure of the best way to market this new service in each location. How should they call it? How should they describe its utility? They were not responding to a genuine demand and had no clear ideology or objectives (other than to spread Big Law Pro Bono practice across their offices). They were already encountering resistance even based on their cautious early efforts. Moreover, they wanted to market this service in multiple locations, spanning a continent, but had no way, without investing significant resources, of being able to identify which gambles would pay off. Bear in mind that Turner was also responsible for the US pro bono practice of her firm while Kirk and Brocklesby had mandates for London as well as Europe. In essence, they had very finite resources and needed to find a way to both overcome the barriers they were facing and improve their ability to identify suitable opportunities for developing the practice. From around 2006 to 2008, they would find a solution to these problems but it would be a solution that would move the conception of Big Law Pro Bono in Europe further from the objective of promoting individual access to justice.

1.2 Market formation

Europe had not benefitted from a public interest law or poverty law movement forging ties between Big Law and civil society. However, that is not to say that there was no tradition of collaboration among the legal professions more broadly and civil society. As already noticed in Chapter 3, the organized and semi-organized models of pro bono have been deployed over the centuries to engage lawyers in collaborating with civil society actors to provide pro bono services. Whether it was trade unions, citizens' advice bureaus, women's groups, tenants' associations, agricultural associations, Christian organizations or organizations for orphaned children, illegitimate children and their mothers, European lawyers have collaborated with civil society to provide pro bono legal services.

However, as discussed in Chapter 3, Europe had benefitted from civil liberties, human rights and public interest law movements, and as such, there was a tradition of collaboration between the legal profession and civil society, oriented around civil liberties and, subsequently, human rights and public interest lawyering. As will be explored below, the civil liberties, human rights and public interest law movements in Europe created a large population of non-profit organizations with broadly "law reform" objectives. Such objectives, based on the definitions and categorizations developed in Chapter 2, might be described as related to access to justice

(wide definition) and rule of law. That is, they aimed at achieving systemic change by making domestic judicial processes and outcomes more just. They did so typically by leveraging on international law and norms to undermine the legitimacy of domestic political and legal norms, forcing national legislatures, executives and judiciaries to redefine such norms, rendering them fairer, more inclusive and more equitable. A second and related objective was to guarantee a functional, clear and predictable legal system where individual rights are protected in a consistent manner and where government is bound by law and held accountable to its citizens. To pursue these objectives, the non-profits made heavy reliance on international and comparative law, to pursue law reform and policy change. In time, these non-profits and their model of legal advocacy would become forged with Big Law Pro Bono in Europe, giving it a unique flavor, distinct from its American forbearer. In the following passages, I will explore how this model of legal activism emerged.

1.2.1 A clearinghouse in the making?

In 1997, toward the beginning of the Central and Eastern European Public Interest Law Movement (explored in Chapter 3), Edwin Rekosh (a consultant for the Ford Foundation and Columbia Law School graduate) launched the Public Interest Law Initiative in Transitional Societies at Columbia Law School (PILI and subsequently PILnet) with seed funding of \$400,000 from the Ford Foundation.⁸³¹ The stated aim in the original grant application to the Ford Foundation was “to promote public interest law in Russia and Eastern Europe”.⁸³² More specifically, the aims of PILI were to provide published resources and networking services to the growing public interest law community in Central and Eastern Europe (CEE).⁸³³

PILnet was launched into the heart of the European public interest law movement (Rekosh being primarily responsible for the organization of the first conference in Oxford in 1996, discussed in Chapter 3), and after being set up, quickly established itself as the central resource and actor for both domestic and international public interest law actors in the region. It was responsible for the organization and coordination of the conference on public interest law in CEE in 1997 and several other such conferences, and became a central coordinating body between the efforts of various funders to “construct” public interest law in the region (including

⁸³¹ See <http://www.pilnet.org/public-interest-law.html>.

⁸³² Public Interest Law Initiative in Russia and Eastern Europe, “A Proposal Submitted to the Ford Foundation by Columbia Law School,” July 1997, 1.

⁸³³ McClymont and Golub, *Many Roads to Justice*, 241.

Ford, Open Society, Rockefeller, MacArthur and Mott, all of which had funded PILnet in varying degrees during this period).⁸³⁴ In this capacity, PILnet came into contact with many of the core grantees and stakeholders in this movement (organizations such as the Polish Helsinki Foundation, the Massag Foundation, the Women's Rights Centre, INTERIGHTS, the European Roma Rights Centre, the Czech Helsinki Committee, the Hungarian Civil Liberties Union, the Legal Defence Bureau for National and Ethnic Minorities).⁸³⁵ Adopting a “catalytic approach”, PILnet sought to accelerate transformative change by providing a supportive framework for progressive developments within legal education, the professional bar, the state and civil society. The stated philosophy of PILnet was to convene the right people (those that could make change), give them a framework for discussion and get them talking. Concretely, the organization played a role in: promoting and facilitating the establishment of over 70 university law clinics;⁸³⁶ initiating a process of legislative reform in relation to legal aid and access to justice in multiple jurisdictions;⁸³⁷ and chiefly, in spreading a culture of public interest law practice among civil society organizations - this included encouraging the adoption of comparative legal approaches, promoting the use of international and regional human rights mechanisms and stimulating the use of impact litigation strategies, but essentially involved tooling up civil society with respect to legal strategies.

A handful of examples of PILnet's activities from its 2002-2003 grant report may serve to illustrate its role.⁸³⁸ During that period, PILnet:

- Ran a workshop on administrative remedies for NGOs and public interest lawyers;
- Collaborated with the OSCE to conduct a series of freedom of association advocacy trainings for NGOs;
- Launched a freedom of association source book with the Council of Europe;

⁸³⁴ PILnet grant files, 1998 to 2003 (on file with author).

⁸³⁵ Irena Grudzinska-Gross, PSJ: Governance and Civil Society, Recommendation for Grant, Re: Support to Promote Public Interest Law in Eastern Europe, Grant No. 970-0685, 970-0686 (1998).

⁸³⁶ PILnet came to play a central convening role in the European clinical legal education movement. See Alemanno and Khadar, *Reinventing Legal Education*, 1–26.

⁸³⁷ Working with a coalition of organizations and actors including the Open Society, PILnet was able to secure big changes to the legal aid regimes of Lithuania, Hungary, Bulgaria, and Latvia. See Access to Justice in Central and Eastern Europe, 2nd European Forum on Access to Justice, organized by the Public Interest Law Initiative in collaboration with the Open Society Justice Initiative, Feb. 24–26, 2005, Budapest, Hungary, Forum Report, 1, 12, 13.

⁸³⁸ Public Interest Law Initiative, Columbia University Budapest Law Centre, Final Narrative Report, Ford Foundation Grant No. 970-1586-2 (2003).

- Held a roundtable on anti-discrimination law for a “Roma Participation Program” for the benefit of NGO activists, government officials and Roma organizations;
- Participated in a retreat in Istanbul for its 100 fellows from its fellowship program (the sponsorship, each year, by PILI of several human rights activists from CEE to study at Columbia Law School in New York for several months) and human rights fellows from the Central European University, American University and the University of Essex;
- Organized an annual clinical legal education colloquium in Warsaw;
- Helped to establish a Polish Clinical Legal Education Foundation (to support legal clinics across Poland);
- Ran a teacher training program for clinical teachers in Bucharest;
- Held an international conference for non-profit legal clinics in St. Petersburg.

A Ford Foundation internal grantee review file suggests that by 2001, Ford considered that PILnet had, “established itself as one of the main resources and actors for public interest law in the region in a very short period of time”, and that one of its “main strengths” was that it “covers the whole of Central and Eastern Europe as well as Central Asia”, enabling it to contribute significantly to, “building trans-regional coalitions and networks”.⁸³⁹ By its own account, by 2002, PILnet had “reached thousands of lawyers, law professors and law students [in CEE] through its public interest law programs”.⁸⁴⁰

Consequently, and importantly, for our purposes, by the early to mid-2000s, PILnet: had a person-to-person network of hundreds of civil society organizations spanning Central and Eastern Europe; was fully aware of the legal needs of those organizations (having spent almost 10 years skilling them up); knew which social and political issues were the most pressing and which public interest law strategies were likely to be successful; knew which organizations and individuals had the greatest appreciation for “public interest law”; and had connections with and a history of working with the legal bars, law schools, judiciaries and justice ministries of virtually every Central and Eastern European country.

⁸³⁹ Mihaela Serban, Ford Foundation, Inter-office Memorandum, Review of the Public Interest Law Initiative at Columbia University (2001).

⁸⁴⁰ Public Interest Law Initiative, Columbia University Budapest Law Centre, Final Narrative Report, Ford Foundation Grant No. 970-1586-2 (2003), 10.

These attributes rendered PILnet, as an organization, wholly *sui generis*. PILnet was exactly the kind of intermediary that the Big Law entrepreneurs needed in order to overcome some of the challenges they had been facing. As it happened, however, PILnet had a problem of their own to solve. By 2001, many of the US funders who had poured into the region (e.g. Ford Foundation, USAID, Mott Foundation, German Marshall Fund, the American Bar Association) were beginning to pull out. The Ford Foundation, which had provided PILnet with 40% of its funding between 1997 and 2001, had launched an exit strategy and was tying off all of its grants (including grants for PILnet).⁸⁴¹ There was a belief that, with the accession process well under way for many CEE states, the EU should take over as the primary funder of civil society organizations in the region, and accordingly both Ford and the Open Society began gradually shifting their attention away from CEE.⁸⁴²

Civil society organizations, many of which had received extensive support and mentoring through PILnet, were seeing their funding cut and were beginning to worry about their long-term future.⁸⁴³ Accordingly, PILnet would need to find new ways of channeling resources into the promotion and support of public interest law in Central and Eastern Europe.

1.2.2 Two roads converge: induced innovation and market formation

“Induced innovation theory” predicts that “a change in the relative abundance of inputs to production, or their relative prices, can play an important role in influencing the rate and direction of technical change” or put another way, “a change in relative input abundance, [...] can act as a spur to innovation in an industry.”⁸⁴⁴ Meanwhile, “markets” can be defined as “social spaces where repeated exchanges occur between buyers and sellers under a set of formal and informal rules governing relations between competitors, suppliers, and customers”.⁸⁴⁵ For a market to exist, exchange must transcend “unstructured, haphazard, one-shot, anonymous social exchange”.⁸⁴⁶ Finally, business studies literature suggests that global (or international) markets will emerge where “there is sufficient convergence in demand conditions across

⁸⁴¹ Email from Irina Grudzinska-Gross to Ed Rekosh, Mar. 24, 2003 (on file with author); Mihaela Serban, Ford Foundation, Inter-office Memorandum, Review of the Public Interest Law Initiative at Columbia University (2001).

⁸⁴² Irina Grudzinska-Gross, “Reflection Memo” (2002), on file with author re shifting funding priorities of donors; interview with Filip Czernicki, June 23, 2016.

⁸⁴³ Interview number 11, Oct. 7, 2015.

⁸⁴⁴ Hanlon, “Necessity is the mother of invention,” 67–100.

⁸⁴⁵ Fligstein and Dauter, “Sociology of markets,” 114.

⁸⁴⁶ Ibid.

countries that firms can sell essentially identical products in different national markets”.⁸⁴⁷ These concepts may be useful in comprehending how and why, from around 2003, PILnet began to facilitate the establishment of a market for the exchange of Big Law Pro Bono services across the continent.

Rekosh had already come into contact with the idea of pro bono as long ago as 1988 during his time as an associate at New York law firm, Coudert Brothers. While there, he had engaged in pro bono work himself for organizations like Human Rights Watch, Lawyers Committee for Human Rights and the International League for Human Rights.⁸⁴⁸ By 2000, Rekosh, now at the helm of PILnet, was again encountering Big Law Pro Bono via his contacts in the New York public interest law scene (where he was well-connected and known as the “guy to go to about public interest law in Eastern Europe”), such as Joan Vermeulen (the Director of New York Lawyers for the Public Interest and later Founding Director of the Vance Centre for International Justice).⁸⁴⁹ Furthermore, in early 2001, Rekosh was invited by Suzie Turner to attend the very same conference she had organized with SPBG in London (mentioned above) about establishing Big Law Pro Bono Practice in mainland Europe.⁸⁵⁰ At the time, Rekosh recalls noticing that there were virtually no lawyers from continental Europe in attendance. During these early interactions around the topic, Rekosh was not persuaded that Big Law Pro Bono could be successful in the more conservative Continental European context.⁸⁵¹ Conversations between Turner and Rekosh would continue for the next several years but would not materialize into any concrete collaboration until late 2006.

However, with growing concerns around the long-term viability and sustainability both of PILnet and the many non-profits in its network, Rekosh remained open to the idea of Big Law Pro Bono. By mid-2001, it was becoming increasingly clear that the Ford Foundation was considering terminating its funding program for public interest law in CEE (the *raison d'être* for PILnet) and tying off its funding for PILnet. PILnet had received over \$1 million from Ford between September 1997 and April 2001, with the last payment of \$180,000 scheduled under

⁸⁴⁷ Germain, *Globalization and its Critics*, 176.

⁸⁴⁸ Curriculum vitae of Edwin B. Rekosh, 1997.

⁸⁴⁹ Interview number 8, Oct. 1, 2015.

⁸⁵⁰ Interview number 16, Oct. 21, 2015.

⁸⁵¹ Interview number 11, Oct. 8, 2015.

that program for April 2001.⁸⁵² Internal grantee review files and correspondence from this period reveal the pressure that Rekosh must have been under. Ford was apparently concerned about the high costs of supporting PILnet due to its maintaining an office in New York and felt, moreover, that this “represent[ed] a major obstacle towards achieving its goals”.⁸⁵³ Ford felt that, “while focused enough, some of the projects [of PILnet] could be substantially improved”.⁸⁵⁴ “It is not clear”, the memo goes on to say, “to what extent PILI still aims to fulfil the goals that justified its founding [and, in any event] changing conditions in the field of public interest law in CEE, may require PILI to redefine its priorities and long-term goals, as well as to re-assess some of its programs”.⁸⁵⁵ In an email to the grant manager at Ford, in summer of 2001, Rekosh queries, “I received today the grant letter from the Ford Foundation for \$180,000 [...] we are grateful for the support [...] I had been under the impression, however, that this amount of funding was intended to cover just one year [...] and that we were welcome to apply for some amount of funding beginning 2002 for general support [...]”.⁸⁵⁶ Irena Grudzinska Gross (the grant manager) responds: “we were thinking about not supporting anymore the office in New York (even though I am sure it is very useful), and funding partially the entity in Budapest. I am just not sure how long our support will last, as we are again discussing the future of the EE [Eastern Europe] program.”⁸⁵⁷ It is unquestionable that Rekosh, who was now supporting a staff of six at PILnet, would have felt the pressure, during this period, to seek out alternative funding sources, or at the very minimum, new opportunities and ways of redefining the purpose and justification for PILnet.

Around the same time, Rekosh recalls that, to him, Big Law Pro Bono began to “look like one part of the answer for long-term sustainability” of all that PILnet (and the broader public interest law movement) had sought to achieve.⁸⁵⁸ In the words of Rekosh: “I was interested in pro bono because I could see some long-term potential to build a sustainable base [for all of the work that PILnet had done] over the prior 10 years or so [and moreover] it would add resources to meet the legal needs of civil society.”⁸⁵⁹

⁸⁵² Email from Irina Grudzinska-Gross to Ed Rekosh, Mar. 24, 2003 (on file with author); Mihaela Serban, Ford Foundation, Inter-office Memorandum, Review of the Public Interest Law Initiative at Columbia University (2001).

⁸⁵³ *Ibid.*

⁸⁵⁴ *Ibid.*

⁸⁵⁵ *Ibid.*

⁸⁵⁶ Email from Ed Rekosh to Irina Grudzinska-Gross, July 6, 2001 (on file with author).

⁸⁵⁷ Email from Irina Grudzinska-Gross to Ed Rekosh, July 9, 2001 (on file with author).

⁸⁵⁸ Interview with Ed Rekosh, Oct. 7, 2015.

⁸⁵⁹ *Ibid.*

It was, in fact, pressure from below that finally convinced Rekosh to test the water and involve PILnet in Big Law Pro Bono. When, an intern at an international law firm based in Budapest began pressing the PILnet leadership to take pro bono more seriously, Rekosh decided it might be worth at least experimenting.⁸⁶⁰ Accordingly, in 2002, spotting an opportunity, PILnet launched a “Pro Bono Initiative” together with the Legal Clinics Foundation in Warsaw.⁸⁶¹ The initiative sought to match Polish commercial firms with Polish university law clinics.⁸⁶² The initiative resulted in the organization of a meeting in May 2003 with a number of law firms and the Polish bar to explore pro bono in Poland. The meeting, however, was a huge disappointment as virtually no law firm representatives turned up. Filip Czernicki (head of the Polish Clinics Foundation) recalls that “nobody came, besides me and Ed [Rekosh], there were like two people. It was a total disaster.”⁸⁶³ Ultimately, the Polish initiative failed due to limited firm buy-in. Nevertheless, it did result in the establishment of the now well-regarded Polish Lawyer Pro Bono Award.⁸⁶⁴

PILnet had simultaneously been pursuing a similar initiative in Hungary, which would achieve greater success. Feeling a sense of confidence and optimism that they could learn from the Polish experience and that there was merit in the idea, in 2005, PILnet launched the “Central and Eastern European Pro Bono Initiative”. The initiative sought to “establish pro bono practice on a clear, institutionalized basis in Central Europe”.⁸⁶⁵ The Initiative, focusing primarily on Hungary, sought to do this by: identifying the pro bono needs of non-profits working in Hungary (PILnet’s core constituency); establishing a clearinghouse to connect Hungarian commercial firms and lawyers with the non-profits and enabling them to do pro bono work; organizing discussions with the Budapest bar; and organizing an international conference on pro bono in Budapest.⁸⁶⁶ Preparations for all of these activities were already underway by mid-2005.

⁸⁶⁰ Interview number 4, Sept. 25, 2015.

⁸⁶¹ Public Interest Law Initiative, Columbia University Budapest Law Center, Final Narrative Report, Ford Foundation Grant Report No. 970 1586-2, July (2003).

⁸⁶² *Ibid*; see also interview with Ed Rekosh, Sept. 30, 2015.

⁸⁶³ Interview number 49, June 23, 2016.

⁸⁶⁴ *Ibid*.

⁸⁶⁵ Public Interest Law Initiative, Columbia University Budapest Law Center, Central European Pro Bono Initiative, June (2005).

⁸⁶⁶ Email from Ed Rekosh to Miriam Buhl, Aug. 4, 2005.

Rekosh, Tamás Barabás (then a legal officer at PILnet) and Atanas Politov (then the associate for legal practice) saw great potential in their new Initiative but had learned from the prior failed Polish experiment with pro bono,⁸⁶⁷ that for the Initiative to work, they would need support from within the law firms themselves. There were around seven or eight large international law firms with offices in Hungary at the time (including Clifford Chance, White & Case, Linklaters and Allen & Overy). The question was: how could PILnet get them to buy into and support the idea?

The answer came through Rekosh's contacts in New York at the International Senior Lawyers Project (ISLP). With the support of Jean Berman (then Executive Director of ISLP), PILnet managed to secure some pro bono assistance to help drive things forward.⁸⁶⁸ Michael Cheroutes, a retiring infrastructure finance lawyer from Hogan & Hartson, came to work at PILnet's Budapest offices for several months in early 2005. Cheroutes had 40 years of experience behind him and had worked in very senior positions in Hogan's London, Warsaw and Moscow offices. Cheroutes' objectives were clear; he was to help them open the door to some of the large international firms in Budapest and more broadly in the region, help design a governance structure and strategy for the Initiative and help them to design and launch a Hungarian clearinghouse.

Cheroutes recalls that when he arrived at PILnet's Budapest office in early 2006, they were having "some success with the Initiative but not [receiving] a lot of enthusiasm [from the law firms]".⁸⁶⁹ Much time was spent strategizing how they could achieve some traction given that neither the Hungarian bar nor the lawyers at the international law firms were immediately enthusiastic.⁸⁷⁰ Cheroutes reflects that, what he was able to bring to the project was: "...some grey hair, some seniority [which] may have helped more than bringing new ideas into it [...] just having somebody there who was associated with a successful practice that had dedicated

⁸⁶⁷ Firstly, in 2002–03, spotting an opportunity, PILnet launched a Pro Bono Initiative together with the Legal Clinics Foundation in Warsaw. The initiative sought to match Polish firms with Polish university law clinics. The initiative resulted in the organization of a number of meetings, one of which was held in May 2003 with a number of law firms and the Polish bar to explore pro bono in Poland. The meeting was not an enormous success as few law firm representatives turned up and ultimately the initiative did not succeed due to limited firm buy-in. Nevertheless, it did result in the establishment of the now well-regarded Polish Lawyer Pro Bono Award and, several years later, in the establishment of the now very successful Centrum Pro Bono (Polish Clearinghouse).

⁸⁶⁸ Email from Jean Berman to Ed Rekosh, Oct. 17, 2005.

⁸⁶⁹ Interview number 25, Jan. 25, 2016.

⁸⁷⁰ Ibid.

a lot of time to pro bono activity. That helped get in the door to some of the law firms over there and gave some credibility to the whole effort.”⁸⁷¹ Rekosh later reflected that: “During Mike’s stay with us, we were able to make significant progress in getting a critical mass of Hungarian offices of international firms to gel around a commitment to promote pro bono practice. Mike’s communication skills and strategic thinking were critically helpful”.⁸⁷² It was however also crucial to have the local insight that the PILnet staff brought to the table; Barabás recalls how careful they were to be clear with all local actors that pro bono was not an American imposition but a practice rooted in the heritage of the Hungarian legal profession. To this end, they had undertaken research at the archives of the Hungarian Bar, which had produced evidence of pro bono lawyering (on an ad hoc individual basis) in Hungary as far back as the turn of the century (around 1910).⁸⁷³

Working with Cheroutes, PILnet managed to persuade 10 law firms to appoint Budapest-based pro bono coordinators from among their legal staff. These coordinators were then constituted as a “Pro Bono Coordinator Committee” and meetings were organized between the Committee and PILnet every three or four months.⁸⁷⁴ In April of 2006, they convened the first meeting at the PILnet offices in Budapest.⁸⁷⁵ Cheroutes, like Rekosh, was very keen to use the Initiative to attract resources from the law firms to fund PILnet’s activities (e.g. a clearinghouse and an international pro bono event). An idea to request a \$10,000 annual contribution from each of the major firms, as a donation towards the Initiative was further pursued with Cheroutes. By summer of 2006, it had come to fruition and they had managed to secure commitments of around \$10,000 from 4 of the large international firms based in Budapest.⁸⁷⁶ As confidence in PILnet grew over the years, the gross annual donations from law firms would soar to over \$500,000 by 2014, significantly easing funding pressure caused by the withdrawal of the Ford Foundation and others between 2001 and 2004.⁸⁷⁷

⁸⁷¹ Ibid.

⁸⁷² Letter from Ed Rekosh to Jean Berman, June 15, 2006.

⁸⁷³ Interview number 50, June 24, 2016.

⁸⁷⁴ Public Interest Law Institute, “Building CEE/NIS Public Interest Law Networks 2007 Final Report,” submitted to Charles Stewart Mott Foundation, Reporting Period: Jan. 1, 2007 to Dec. 31, 2007, 21.

⁸⁷⁵ Public Interest Law Institute, “Concept Paper for White & Case,” Sept. 21, 2007, 2.

⁸⁷⁶ Clifford Chance, Hogan & Hartson, Latham & Watkins, and Weil, Gotshal & Manges, Public Interest Law Initiative, “Proposal for Institutional Support,” submitted to the Ford Foundation, Grant Period: Jan. 1, 2007 to Dec. 31, 2008 (2006), 8.

⁸⁷⁷ For reference, PILnet’s total operating budget was around \$2 million in 2002 and over \$3 million by 2010. PILnet, “PILnet Finance and Development Report,” PILnet fundraising history (2015); and PILnet, “Business Plan: 2001–2014,” (2011), 6.

Also in summer and autumn of 2006, they made another big breakthrough when they managed to convince the firms to endorse a “Pro Bono Declaration”. The declaration stipulated that: “We firmly believe that all of our colleagues can find an appropriate balance between working for their clients who can afford to pay and for those who cannot, since it is our ethical responsibility to ensure that all member of the Hungarian society are provided with legal services”.⁸⁷⁸ This was a template they would soon repeat across the rest of Europe.⁸⁷⁹ By July of 2006, they had already secured endorsements from nine firms. The final leap they would need to make would be to officially launch a clearinghouse that could connect the Budapest-based lawyers of international law firms with Hungarian civil society organizations in need of legal assistance.

In anticipation of launching the clearinghouse, PILnet leveraged on the civil society contacts that it had built up over the past years to identify suitable legal projects. Meanwhile, Cheroutes helped to make the projects attractive for international law firms.⁸⁸⁰

PILnet needed to ensure that the clearinghouse would secure strong institutional support from all the firms they were targeting. It was at this point that Rekosh called on Turner for additional support. In the first week of December 2006, with the help of Turner and Miriam Buhl (Pro bono Counsel at Weil, Gotshal & Manges), PILnet organized a couple of successful luncheons promoting the clearinghouse in New York and DC with the Pro Bono Counsel of 12 large firms.⁸⁸¹ Finally, PILnet officially launched its first clearinghouse in Hungary on 15 December 2006. The first projects that flowed through the Hungarian clearinghouse were a Polish Constitutional Court Claim for the Helsinki Foundation for Human Rights, comparative legal research on deportation policies for Human Rights Watch, comparative legal research on homelessness issues for the National Law Centre on Homelessness and Poverty, and research on anti-discrimination and equality law for PILnet itself.⁸⁸² The early firms to get involved in the clearinghouse projects were Dechert, DLA Piper, Sidley Austin, Sullivan & Cromwell and O'Melveny & Myers.⁸⁸³ Having identified a model that worked, the success in Hungary was followed by the launch of a Global clearinghouse (connecting law firms with NGOs all over

⁸⁷⁸ Public Interest Law Initiative, “Hungarian Lawyers’ Role in Advancing the Public Good (*Pro Bono Publico*),” (2006).

⁸⁷⁹ In Poland, the Czech Republic, Russia, and Georgia (to name just a few).

⁸⁸⁰ Email from Ed Rekosh to Michael Cheroutes and Suzie Turner, Dec. 19, 2006.

⁸⁸¹ Email from Atanas Politov to international law firm representatives, Nov. 17, 2006.

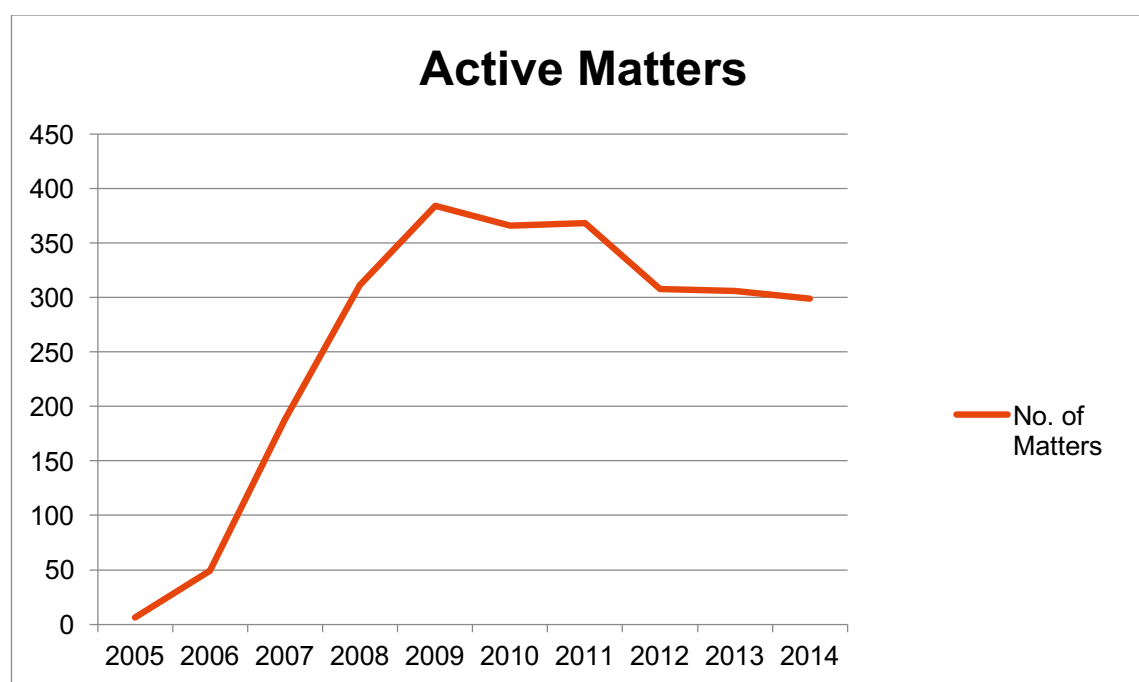
⁸⁸² Email from Ed Rekosh to international law firm representatives, Dec. 15, 2006.

⁸⁸³ Email from Ed Rekosh to Michael Cheroutes and Suzie Turner, Dec. 19, 2006.

Europe and all over the world) later in the same year and, with assistance from USAID, ISLP and a few key law firms (notably White & Case), a Russian clearinghouse in 2007.

There has been a rapid rate of growth since the launch of the Central and Eastern European Pro Bono Initiative in 2005. The following three tables illustrate over ten years (2005 – 2014): (1) the number of “active matters”⁸⁸⁴ that were engaged in across PILnet’s three main clearinghouses catering to the European pro bono market (Global, Hungary and Russia); (2) the number of law firms providing services to NGOs through the clearinghouses by reference to active matter⁸⁸⁵; and (3) the number of NGOs served through the three clearinghouses by reference to active matters.⁸⁸⁶

Figure 1



⁸⁸⁴ In other words, matters worked on by private sector lawyers for NGOs for any period during a given year excluding matters that were subsequently withdrawn.

⁸⁸⁵ In other words, by reference to the year(s) during which the relevant matter was active rather than by reference to the year in which the law firm was first assigned the matter or the year in which the law firm completed the matter.

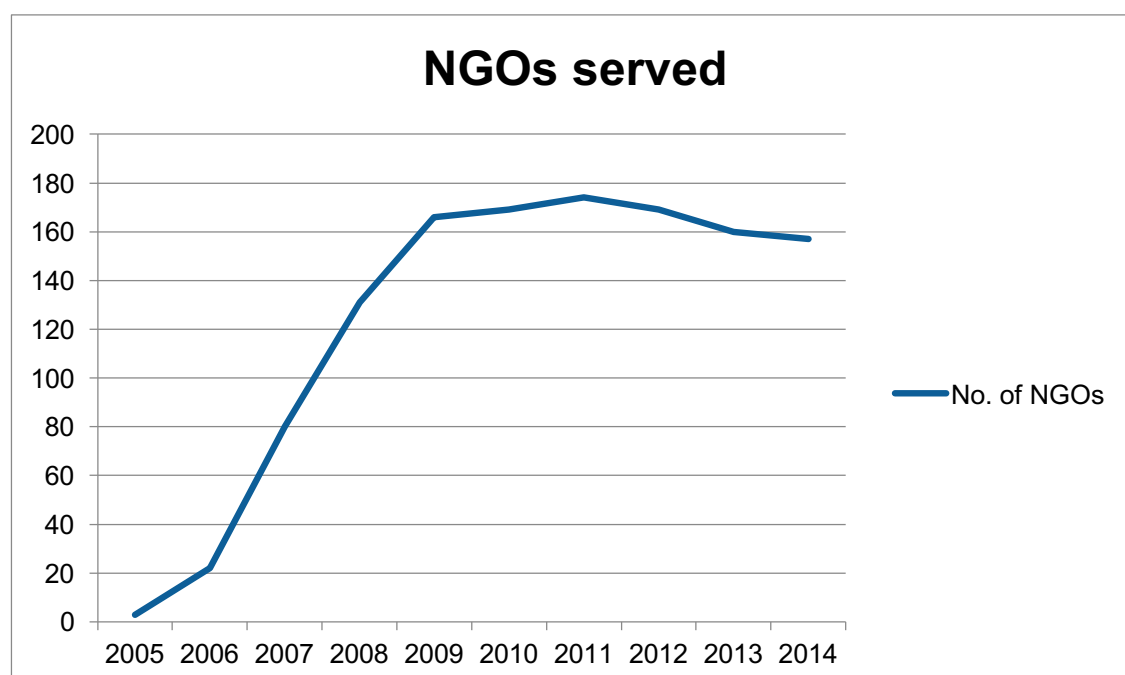
⁸⁸⁶ In other words, by reference to the year(s) during which the relevant matter was active rather than by reference to the year the NGO first offered the matter or the year in which the NGO was ultimately assigned a law firm team to handle the matter.

Figure 2



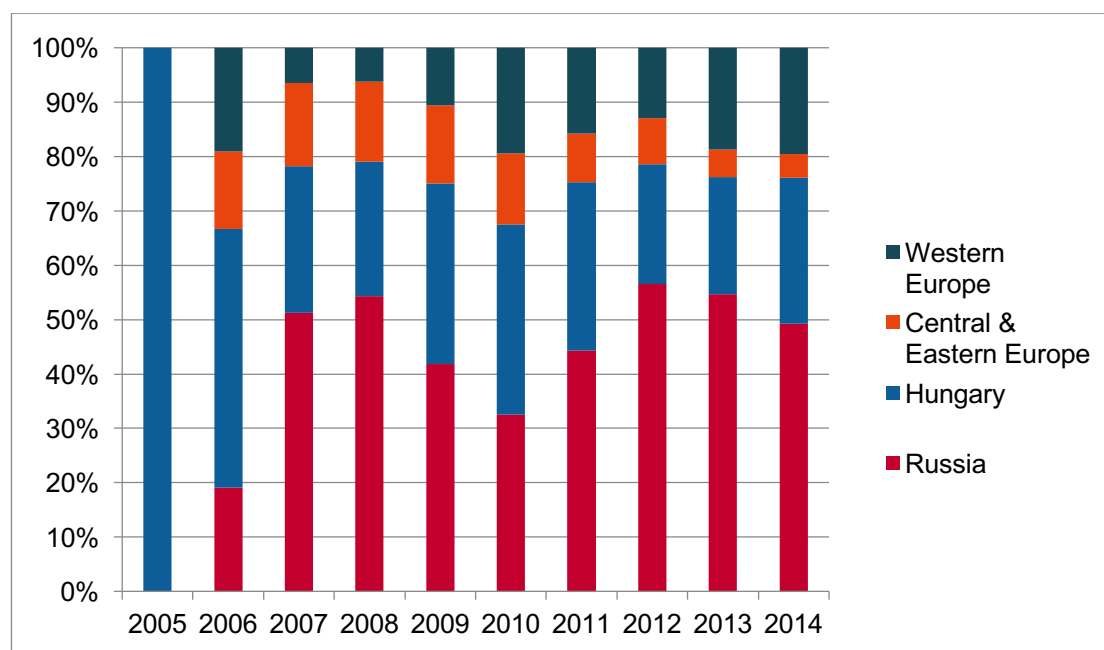
Since 2005, there has been a large increase in: a) the number of matters passing through the clearinghouses (from 6 in 2005 to over 300 since 2008); b) the number of law firms participating in the clearinghouses (from 4 in 2005 to around 90 since 2010); and c) the number of NGOs receiving free legal services through the clearinghouses (from 3 in 2005 to over 150 since 2009).

Figure 3



The growth has not only been in terms of the number of actors involved but also geographically. The chart below illustrates that the clearinghouses, which were initially focused primarily on Central and Eastern Europe, have begun to serve (through the Global clearinghouse) more and more Western European NGOs (which represented around 20% of all NGOs across all 3 clearinghouses in 2014).

Figure 4 - % of NGOs serviced in Europe through PILnet's Global, Hungarian and Russian Clearinghouses by location of NGO (2005 – 2014)⁸⁸⁷



Ultimately, it is likely that the pressure placed on PILnet and on the public interest law and human rights fields more broadly in Central and Eastern Europe, by the decision of US funders to withdraw between 2002 and 2004, necessitated innovation to guarantee survival. By 2003, for Rekosh and PILnet the opportunity for innovation came in the form of Big Law Pro Bono. For PILnet, Big Law Pro Bono simultaneously: provided a source of new income; demonstrated to funders like Ford, that PILnet still had a *raison d'être* - Ford was persuaded to issue another 300K grant to PILnet in 2007 to support its pro bono programming in Russia;⁸⁸⁸

⁸⁸⁷ NGOs calculated by reference to active matter, i.e., by reference to the year(s) during which the relevant matter was active rather than by reference to the year the NGO first offered the matter or the year in which the NGO was ultimately assigned a law firm team to handle the matter.

⁸⁸⁸ PILnet grant files, on file with author.

and channeled legal assistance into the network of domestic and transnational human rights and public interest law organizations that had flourished in Europe since the late 1980s.

Meanwhile, for the Big Law Pro Bono entrepreneurs, as will be discussed in more detail below, PILnet provided a solution to the challenges they were facing. PILnet reduced their barriers to entry to the continental European market by operating as an intermediary between the firms and a broad network of non-profits in need of pro bono support, typically in the form of comparative legal research. PILnet also solved the multi-armed bandit problem by allowing the firms to outsource their pro bono client “business development” activities thus reducing the time investment required from the firms and removing a degree of uncertainty and unpredictability by allowing them to work through a known entity that could filter pro bono matters in advance. In the words of Kirk, “PILnet was instrumental to developing all the relationships with NGOs and PILnet was able to develop that entirely themselves.”⁸⁸⁹

Quite rapidly, a market for Big Law Pro Bono emerged, with PILnet operating as a market-maker “buying” up pro bono requests from its network of non-profits and “selling” them on to the firms. The domestic Hungarian market very quickly turned into an international market for Big Law Pro Bono services, given that firms had offices spanning the continent and non-profits needed essentially the same services across the whole region: legal research, typically of a comparative nature.

However, the alliance of Big Law with PILnet would have consequences on how European (commercial) lawyers and non-profits would come to understand Big Law Pro Bono as a resource. In time, Big Law Pro Bono in Europe would come to be defined primarily (almost exclusively) in terms of providing research and operational legal assistance to non-profits. The following section will explore how this came to be so.

1.3 Big Law Pro Bono™

In marketing studies, “consumer preference formation” refers to the ways in which “consumers learn about brands and form preferences for them”, which can create an advantage for pioneers in the relevant market (the so-called “pioneering advantage”).⁸⁹⁰ According to this theory,

⁸⁸⁹ Interview number 17, Nov. 3, 2015.

⁸⁹⁰ Carpenter and Nakamoto, “Consumer preference formation,” 286.

when new markets are just emerging, consumers may have limited preferences in relation to the attributes of goods or services being sold. For example, “100 years ago few people were likely to have strong opinions about how sweet or carbonated a cola should be”.⁸⁹¹ However, successful early entrants on the market can have a “major influence” on how attributes of the relevant good or service are valued and how consumers’ preferences evolve during the embryonic years of market formation.⁸⁹² Moreover, “the pioneer can become strongly associated with the product category as a whole and, as a result, become the “standard” against which all later entrants are judged.”⁸⁹³ Finally, this can lead to the emergence of copycat or “me-too” brands which aim to cash-in on the economic opportunity generated by the pioneer.

These concepts may help to shed light on how PILnet, along with the Big Law Pro Bono entrepreneurs, participated in creating a market for Big Law Pro Bono that was focused almost exclusively around the provision of legal services to non-profits.

1.3.1 Pro bono roundtables, the Pro Bono Forum and the domestic clearinghouse movement

In late 2006, while PILnet was launching their Hungarian Clearinghouse, the Big Law Pro Bono entrepreneurs (Turner, Kirk and Brocklesby), were piloting another strategy for promoting pro bono in Europe: “pro bono roundtables”. Pro bono roundtables essentially involved getting several prominent lawyers from leading firms in a relevant jurisdiction to literally sit around a table and discuss the viability and desirability of expanding pro bono practice in their country.

Turner, an American (Kirk and Brocklesby being both British, although working for US firms), had been significantly involved in pro bono work in the US since at least 1987 (when Big Law Pro Bono was once again on the rise in the US) and, to her, the idea of organizing pro bono roundtables was nothing new; she had been involved in organizing such roundtables in the US for many years already. This was “strict community organizing [...] you get people to move in a certain kind of direction, you try to convene and bring them together”.⁸⁹⁴

⁸⁹¹ Ibid.

⁸⁹² Ibid.

⁸⁹³ Ibid.

⁸⁹⁴ Interview number 16, Oct. 21, 2015.

Turner, together with Kirk and Brocklesby, started by convening a pro bono roundtable at Dechert's offices in Munich in late 2006. Turner recalls, "it was one of those things where we didn't know if anyone was going to show up, and we were pleasantly surprised that people were really engaged".⁸⁹⁵ The successful Munich roundtable was followed up by 3 more in Paris, Brussels and Frankfurt in 2007.⁸⁹⁶ Turner and Kirk invited Rekosh to become involved from the second roundtable (Paris) in 2007. Arguably the most successful of these early efforts were the Munich and Frankfurt roundtables. At the time, providing free legal advice was prohibited in Germany by law.⁸⁹⁷

The roundtables resulted in meetings between international law firms based in Germany and the Munich and Frankfurt Bar Associations (although, notably, no non-profits at this point) to try and work out a compromise in relation to the provision of free legal advice. Compensation of lawyers was regulated by a federal law (the German Act on Legal Counseling, "Rechtsberatungsgesetz" or "RBerG"), which expressly prohibited the provision of free legal advice.⁸⁹⁸ In December 2006, the RBerG was replaced with the Lawyers Compensation Act (Rechtsanwaltsvergütungsgesetz - "RVG"), which did little to improve the situation. The new regulatory framework was slightly more permissive, enabling lawyers to negotiate fees with clients with respect to advisory work, but fees in a litigation context were strictly regulated and determined in accordance with the "value of the claim" (*e.g.*, calculated based on the value of the underlying transaction or damages claimed).⁸⁹⁹ Despite the removal of the outright prohibition, the permissibility of Big Law Pro Bono under German law remained unclear at best (and appeared to be explicitly precluded with respect to litigation). The regulatory ambiguity created reluctance among German law offices to engage in pro bono, reinforced by the hostility of the German state and federal level bars, which took the position that pro bono was prohibited under German law.⁹⁰⁰

In the meantime, while waiting for clarification on their ability to act in domestic pro bono matters, an agreement was reached that German lawyers might, nevertheless, get involved in assisting non-profit clients abroad (as this would not contravene the rules). Interestingly, these

⁸⁹⁵ Ibid.

⁸⁹⁶ Mayer Brown LLP, *Pro Bono Update*, Spring 2008, 21.

⁸⁹⁷ Latham & Watkins, "A Survey of Pro Bono Practices and Opportunities," 85.

⁸⁹⁸ Ibid.

⁸⁹⁹ Ibid. 82.

⁹⁰⁰ Bälz, Moelle, and Zeidler, "Rechtsberatung pro bono publico," 3383–88.

were often individual clients. For example, lawyers at Debevoise & Plimpton became involved in representing Holocaust survivors in New York who required German law expertise in the context of US proceedings.⁹⁰¹

However, the German roundtables, in which PILnet had now become involved as a facilitator, finally resulted in the publication, in 2008, of an article, “Rechtsberatung pro bono publico in Deutschland – eine Bestandsaufnahme”,⁹⁰² which engaged in a detailed analysis of the provisions of the new legislation, working from the premise that pro bono advice was, by its very nature, provided to clients (singling out non-profits in particular) who could not (and *would* not) pay for legal services in the regular marketplace. Moreover, unlike needy individuals, non-profits could not qualify for legal aid and so would therefore go without legal services altogether if not for the availability of pro bono. The authors argued that the historical prohibition on free legal services (and the regulation of lawyers’ fees under the new regime) was intended primarily to tackle anti-competitive price dumping practices, a purpose irrelevant to under-resourced non-profits, which would not be in a position to purchase legal services regardless of price.⁹⁰³ It should be noted that the way that this article framed pro bono was clearly as a service for non-profit clients and the article even seems to imply (by noting that non-profits do not qualify for legal aid) that the form of pro bono that should be exempted from the prohibition would not involve direct individual client service. The authors also noted that the new legislation explicitly permitted non-lawyers to provide free advisory legal services (provided they were supervised by a professional) and reasoned that professional lawyers should be permitted to provide pro bono advisory services by implication, even if they were excluded from litigating on a pro bono basis.⁹⁰⁴ The publication of this article put many firms at ease and paved the way for growing pro bono practice among international law firms in Germany.⁹⁰⁵

The roundtables (and the European Pro Bono Forum to be discussed below) eventually led, in 2011, to the founding of “Pro Bono Deutschland” (an association of around 50 of the major law firms with a presence in Germany), which has a mandate to “achieve greater recognition and a more widespread implementation of the concept of pro bono legal advice among lawyers”

⁹⁰¹ Interview number 18, Nov. 6, 2015.

⁹⁰² Bälz, Moelle, and Zeidler, “Rechtsberatung pro bono publico,” 3383–88.

⁹⁰³ Ibid.

⁹⁰⁴ Ibid.

⁹⁰⁵ Interview number 18, Nov. 6, 2015.

in Germany.⁹⁰⁶ Similarly, the Paris roundtables contributed to the formation in 2008/9 of the Alliance des Avocats pour les Droits de l'Homme (AADH – the Lawyers' Alliance for Human Rights). The Alliance was set up in collaboration with the Paris Bar and has a mandate to engage lawyers in providing free legal assistance in support of human rights causes (primarily for human rights non-profits).

Both Turner and Kirk were very sensitive to the local contexts in which the roundtables were taking place and the importance of identifying local pro bono champions to take ownership of the processes that they initiated. In the words of Kirk: “We hoped that out of the gatherings would come somebody who would take on the local management of that group...it was definitely led by the local firm representatives...it never occurred to me that you would do it any other way...I was quite sensitive to things not being imposed.”⁹⁰⁷ Meanwhile, Turner simply put it, “when the meetings started taking place in German instead of English, we knew we had done our job”.⁹⁰⁸

PILnet, which, as noted above, had been involved from the second (Paris) roundtable in 2007, were quick to see how they could make use of the roundtable format to further spread pro bono practice across the continent, and, in time, the roundtables initiated by Turner, Kirk and Brocklesby were subsumed into PILnet's work and mandate. Ultimately, PILnet adopted the European roundtable format and applied it, with considerable success, to launch a series of domestic “sister” clearinghouses across Europe.

PILnet began by returning to Poland, where they had failed to launch a clearinghouse in 2004.⁹⁰⁹ In June 2007, PILnet co-organized (with the Polish Legal Clinic Foundation, the Helsinki Foundation for Human Rights and Ashoka) a roundtable discussion at the Polish Constitutional Tribunal.⁹¹⁰ The law firms and their lawyers showed up in large numbers and even the President of the Polish Constitutional Tribunal and the Head of the Polish Bar Association also attended the event.⁹¹¹ The event resulted in the signing of the Polish Pro Bono

⁹⁰⁶ See <http://www.pro-bono-deutschland.org/en/>.

⁹⁰⁷ Interview number 17, Nov. 3, 2015.

⁹⁰⁸ Interview number 16, Oct. 21, 2015.

⁹⁰⁹ Interview number 49, June 23, 2016.

⁹¹⁰ Public Interest Law Institute, “Building CEE/NIS Public Interest Law Networks 2007 Final Report,” submitted to Charles Steward Mott Foundation, Reporting Period: Jan. 1, 2007 to Dec. 31, 2007, 22.

⁹¹¹ Public Interest Law Institute, “Pro bono legal aid in Poland – challenge or necessity,” June 22, 2007.

declaration and directly led to the launch of a Polish clearinghouse (Centrum PRO BONO).⁹¹² This was followed by a Czech pro bono roundtable in March 2008, the signing of a Czech pro bono declaration and the launch of a Czech clearinghouse (Pro bono Centrum).⁹¹³ A Slovenian clearinghouse was also established in 2008, an Irish clearinghouse in 2009, a Slovakian clearinghouse in 2011, a Romanian clearinghouse in 2012 and Dutch and Italian clearinghouses in 2015 (see Figure 12 in Chapter 4 for a timeline).⁹¹⁴ In 2012, 20 domestic clearinghouse representatives took the decision, following a discussion at PILnet's 2012 European Pro Bono forum in Madrid, to form the "European Pro Bono Alliance". The European Pro Bono Alliance is the voice of the clearinghouse movement in Europe. Its goal is to support and promote the work of its clearinghouse members and to strengthen, champion and inform the European pro bono movement.⁹¹⁵

All of these clearinghouses have been largely successful thus far, although in establishing these organizations, PILnet was often required to make concessions to national bars. This was often overcome, as in Italy, Germany and the Czech Republic, by the firms making commitments to exclude individual legal assistance from their pro bono practice and focus exclusively on providing assistance to non-profit organizations. (The Czech and Italian pro bono declarations explicitly exclude individual client work from their definitions of actionable pro bono work.)⁹¹⁶ There are three ways that one might explain such concessions. Most likely they are all partially true. Firstly, we could say that Big Law on the continent, as in London, had no desire to take on the responsibility for the provision of individual legal aid. In the words of one European clearinghouse employee:

"The first thing the law firms will tell you is that their biggest fear is to open their doors and be overwhelmed by clients, by individual people [who need assistance]. They would never do that. They would never open their doors and say 'come in, free legal aid'. They are looking for all [kinds of] buffers, NGOs, clearinghouses, to keep some separation, to be able to control. They need to be able to measure the time and money they are investing into each project, because their paid clients are waiting for them and

⁹¹² Public Interest Law Institute, "Building CEE/NIS Public Interest Law Networks 2007 Final Report," submitted to Charles Steward Mott Foundation, Reporting Period: Jan. 1, 2007 to Dec. 31, 2007, 22.

⁹¹³ *Ibid.*, 23.

⁹¹⁴ Interview number 4, Sept. 25, 2015.

⁹¹⁵ See <http://www.europeanprobonoalliance.org/index.php/2013-08-09-10-13-24/mission>.

⁹¹⁶ Interview number 4, Sept. 25, 2015.

the deadlines are always yesterday. The first thing they will tell you is that we don't want to be a legal aid center, we cannot be a legal aid center.”⁹¹⁷

Another possible explanation is the fact that European bar associations sometimes fiercely resisted Big Law Pro Bono on the basis that it might cut into the earnings of large segments of the legal profession (i.e. traditional small and mid-sized law firms). Not unreasonably, there seems to have been a fear that the Anglo-American Mega-Firms were using pro bono as a guise to break into new sections of domestic legal markets.⁹¹⁸ European bar associations sometimes fiercely resisted pro bono. A large majority of the members of national bars in continental Europe consisted of lawyers working within small local law firms or solo practices, many of whom actively participated in the Social Bar, and relatively few of whom work in Big Law. As a result, the priorities of Big Law and the organized bar in Europe were not naturally aligned. Pro bono was often perceived by the bar leadership as just another competitive advantage for the global law firms.

Yet another possible explanation, implied by a former PILnet employee, is that PILnet, knowing that there might be some resistance to the idea of Big Law Pro Bono, used direct individual client service “strategically”, as a bargaining chip, to trade in at an opportune moment in exchange for commitments to support the non-profit model of Big Law Pro Bono.⁹¹⁹ Indeed, PILnet would often reassure local bars and local lawyers by explaining that non-profits would not pay for most of the work that went through their clearinghouses. “No one would pay 5,000 EUR, 10,000 EUR to several law firms across Europe to do comparative research on best practice.”⁹²⁰ The German example discussed above is illustrative here.

Whatever the case, PILnet was directly and decisively involved in all of the processes and negotiations leading to the launch of the domestic clearinghouses. PILnet facilitated in multiple ways: sometimes actively instigating the setting up of a clearinghouse, as with the Civil Society Development Foundation in Romania; sometimes ensuring that clearinghouses receive the right amount of money from law firm donors, as with Proboneo in Germany and Pro Bono Connect in the Netherlands; sometimes helping clearinghouses better connect to law firms via

⁹¹⁷ Ibid.

⁹¹⁸ Ibid.

⁹¹⁹ Ibid.

⁹²⁰ Ibid.

the PILnet forums, as with AADH in France; sometimes by helping clearinghouses to build support and momentum domestically, as in Poland and the Czech Republic; and sometimes by simply sharing the PILnet manuals related to how to develop a clearinghouse and how to develop an in-house pro bono program.

Ultimately, in the same manner that the organized bar in the US had promoted a narrow and specific model of pro bono based on the ideal of individual access to justice (civil legal aid), PILnet played a crucial and catalytic role in pioneering a specific model of Big Law Pro Bono in Europe. By brokering the launch of domestic clearinghouses, they managed to spread this model with incredible speed. In the words of Rekosh, “we prioritized strategies that would promote rapid growth...[our] strategy was not to build anything ourselves but to look for connection points and to use an open networking approach rather than a closed networking approach. We did not copyright or trademark anything.”⁹²¹ Clearinghouses in the network were all essentially selling the same product. As mentioned in the previous chapter, of the 9 clearinghouses and quasi-clearinghouses whose staff were interviewed for this research (and the several others investigated), virtually all focused primarily or exclusively on catering to non-profit clients. This fact no doubt had an impact on the way in which Big Law, and commercial lawyers in Europe more generally, came to understand Big Law Pro Bono as a practice. Although there is wide variance, law firms are still significantly dependent on clearinghouses for their European pro bono practices. Multiple interviewees reported making extensive use of clearinghouses to source pro bono matters for their European offices, particularly those whose European pro bono practices were managed from the US rather than London. “Without a relationship with PILnet it would be very difficult to develop a program in [our continental European offices] and get a program off the ground starting from zero”, said one Pro Bono Partner.⁹²² In the words of another:

“[t]here are now thanks in part to PILnet, domestic clearinghouses in France, Germany Italy, the UK. So, in every country now there is a domestic clearinghouse where lawyers can source work. That has been the biggest impact for us to significantly expand pro bono internationally.”⁹²³

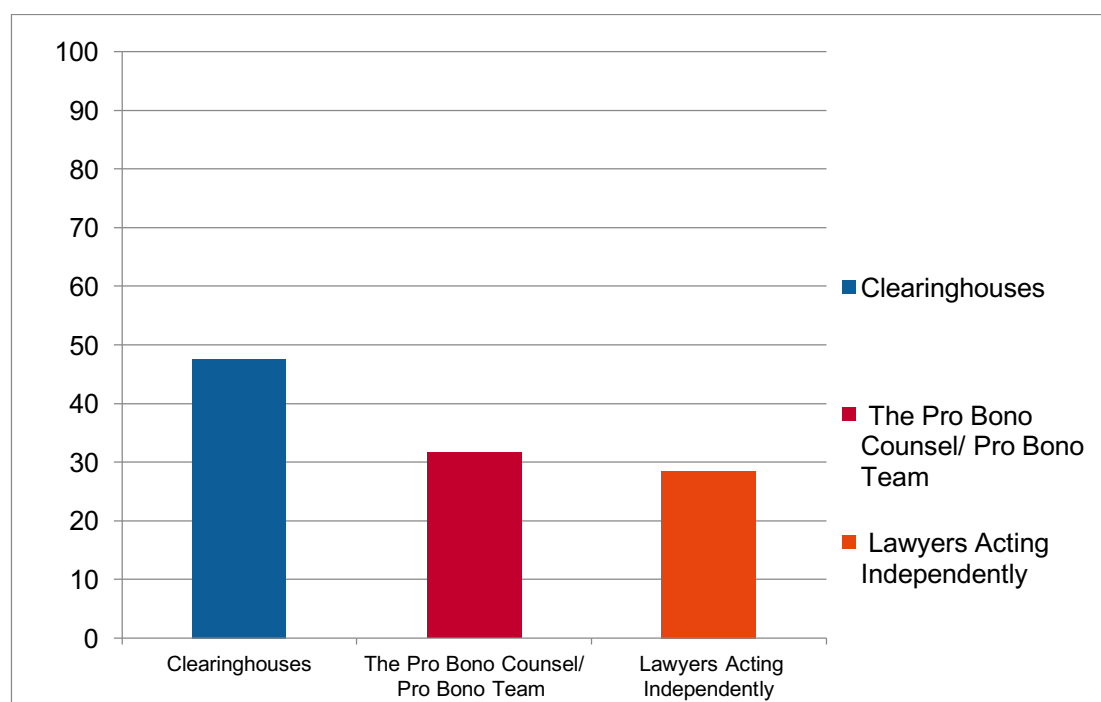
⁹²¹ Interview number 11, Oct. 8, 2015.

⁹²² Interview number 13, Oct. 5, 2015.

⁹²³ Interview number 43, June 16, 2016.

Yet another suggested that “PILnet [had been] central within continental Europe for identifying opportunities”.⁹²⁴ This anecdotal evidence is supported by the survey conducted among 21 firms, which, as noted in the previous Chapter, revealed that the surveyed firms relied on clearinghouses, on average, for almost half of their pro bono matters.

Figure 5⁹²⁵ - *How pro bono in Europe is sourced (average percentage breakdown among 21 international firms)*



Apart from the domestic clearinghouses PILnet was helping to launch, PILnet also launched an annual European Pro Bono Forum. The forums could be used to supplement the roundtable process and the launch of domestic clearinghouses. The idea for the Forum was on PILnet’s agenda since early 2006. The idea was pushed heavily not only by the PILnet staff (especially Rekosh and Politov) but also by Cheroutes, Turner, Kirk, Buhl, Patricia Brannan (Partner at Hogan & Hartson) and Manfred Gabriel (Senior Associate, Latham & Watkins).⁹²⁶

The idea was to organize a first of its kind (in Europe) conference bringing together a large number of law firm lawyers and non-profit representatives to explore the possibility of

⁹²⁴ Interview number 18, Nov. 6, 2015.

⁹²⁵ Khadar, *PILnet Anonymous European Pro Bono Survey*.

⁹²⁶ Public Interest Law Institute, European Pro Bono Forum: Oct. 18–19, 2007, Hotel Novotel, Budapest, Conference brochure, 5.

developing law firm pro bono practice in Europe. The conference was to provide both a forum for connecting law firms and non-profits throughout Europe and a support network for European lawyers trying to set up law firm pro bono programs. Among the central themes of the very first forum were: challenges, success stories and models of pro bono in continental Europe; law firm pro bono programs; non-profits and their legal needs.⁹²⁷ The very first Pro bono Forum took place between 18 and 19 October 2007 at the Novotel hotel in Budapest. It managed to attract some 122 participants from 20 countries including 62 lawyers and 60 non-profit representatives.⁹²⁸ Among the list of speakers was Andrew Phillips (now Lord Phillips of Sudbury) who had set up the Law Society Pro Bono Working Party in England all the way back in 1992 (as discussed earlier), and the forum brochure even contained a foreword from the then President of Hungary, László Sólyom, noting that it was of “pivotal importance to eliminate disparities in accessing the goods of the legal system” and that “even if this task is eminently the domain of the state, lawyers in general bear responsibility for promoting justice by protecting the rights of the individuals”.⁹²⁹ However, this was in contrast to the primary objective of the Forum which, as mentioned, was to connect Big Law with European non-profits, and not just any non-profits, but primarily human rights and public interest law organizations (i.e. rather than organizations involved in the provision of direct individual legal services).

The first three Forums (2007, 2008 and 2009) all took place in Budapest and drew increasingly large crowds; the 2009 Forum attracted 150 participants from 32 countries.⁹³⁰ Following the 2009 Forum, Turner, still part of the organizing committee, wanted to pursue the idea, borrowed from the US, of having the Forum rotate between different cities.⁹³¹ Accordingly, the 2010 forum took place in Paris, attracting 275 participants including the head of the Paris Bar as a keynote speaker. The Forum combined with the prior Paris roundtables initiated by Turner, Kirk and Brocklesby contributed to the development and growth of the Paris clearinghouse, Alliance des Avocats pour les Droits de l’Homme. The Paris Forum was followed by the 2011 Berlin Forum, which, together with the German roundtables, played a role in the formation of Pro Bono Deutschland. In 2012 the Forum moved to Madrid and then Warsaw in 2013, London

⁹²⁷ Ibid.; Public Interest Law Institute, “Concept Paper for White & Case,” Sept. 21, 2007, 3.

⁹²⁸ Public Interest Law Institute, “Building CEE/NIS Public Interest Law Networks 2007 Final Report,” submitted to Charles Steward Mott Foundation, Reporting Period: Jan. 1, 2007 to Dec. 31, 2007, 23.

⁹²⁹ Public Interest Law Institute, European Pro Bono Forum: Oct. 18–19, 2007, Hotel Novotel, Budapest, Conference brochure, 2.

⁹³⁰ Public Interest Law Institute, “General Purposes Support: 2009 Final Report.”

⁹³¹ Interview number 16, Oct. 21, 2015.

in 2014, Rome in 2015 and Amsterdam in 2016. In each case, the flurry of pro bono organizing that precedes the Forums was enormously productive and typically resulted in law firms in the relevant jurisdiction making concrete commitments to increase their pro bono practice. In the words of Kirk, the “traveling model has been hugely successful [and] works on so many levels; you can get politicians involved, bar associations, NGOs and law firm coordinators” and get them all pulling in the same direction.⁹³²

When US and UK Big Law arrived in mainland Europe, and US and London-based pro bono managers were looking for opportunities to develop the practice, local actors on the continent (lawyers, local Bars, non-profits) had no concept of Big Law Pro Bono and how that resource could or should be used. Even the US and UK pro bono managers themselves did not have a clear picture of how they wanted to deploy this resource in continental Europe. Perhaps Suzie Turner was in a privileged position to understand that there were a range of options, having been involved with Big Law Pro Bono in the US since the late 1980s and also having worked in Europe as a consultant at INTERIGHTS, in 1999. (Kirk and Brockelsby had both been fee-earning commercial solicitors before becoming pro bono managers, with no other public interest law experience.) Turner must have been familiar with the way in which Big Law Pro Bono was being deployed in the US, primarily to directly service low-income individuals. Equally, she must have been familiar with the specific model of (trans)national public interest lawyering (discussed in Chapter 3) being pioneered in Europe by organizations like INTERIGHTS, a model that relied heavily on undertaking comparative legal research to identify best and worst practices and placing pressure on domestic courts and administrations by leveraging on international legal norms. Perhaps in Turner’s initial engagements with local actors across the continent, given her previous experience with INTERIGHTS and given her reluctance to play the role of “colonizer”, she did not insist on defining Big Law Pro Bono in a way that would include direct individual client service. Whatever the case, once she teamed up with, and ultimately handed over to PILnet, the die was cast, and Big Law Pro Bono would come to be synonymous with the provision of pro bono legal services to non-profits and *not* individuals.

In Europe, Big Law Pro Bono became associated with non-profits in the same way that *Kleenex* is associated with tissues. The Big Law Pro Bono entrepreneurs, in collaboration with PILnet,

⁹³² Interview number 17, Nov. 3, 2015.

helped to shape the expectations and preferences of commercial lawyers, non-profits, clearinghouses, bars, public officials and others around the continent, such that today, there is (among most of the relevant stakeholders) no real expectation that Big Law should be providing pro bono services to low-income individuals. Interviews undertaken for this research reveal that most clearinghouses in Europe (both at the international and national level) exclusively cater to NGO clients (with a few exceptions in Romania, the UK and Ireland).

Of course, there are a few other contributing factors to this state of affairs, including, hostility from local Bars to the idea of involving Big Law in individual legal assistance work (as described above) and perhaps also the fact that, in Europe, NGOs are attractive pro bono clients for the European law offices of international law firms. There are a couple of reasons for this, both linked to the dynamics of globalization in the European legal market. Firstly, as noted in Chapter 4, the internationalization strategies of large US firms involved exporting US lawyers for the benefit of US clients and involved very limited penetration of local legal markets. Consequently, sourcing pro bono matters that could effectively be carried out by US-trained and qualified lawyers based in London, Brussels or Paris would inevitably require the identification of matters related to international law rather than domestic law. Working with transnational NGOs engaged in advocacy targeted at supranational and international institutions therefore makes much more sense than providing local law advice/representation to low-income individuals. Moreover, such transnational NGO clients are much easier to engage with for full-time pro bono managers based in New York, DC or London, looking to develop pro bono across multiple European offices spanning diverse jurisdictions, languages, and legal cultures. Secondly, as Richard Abel noted already in 1993, “any law firm that aspires to become transnational [...] must emphasize transactional lawyering rather than advocacy”.⁹³³ Consequently, the large bulk of lawyers populating the European offices of large international law firms are transactional lawyers who have specialized in transactional law from a relatively early stage in their career. To get such lawyers to engage in regulatory or transactional work for non-profits is significantly easier, and makes much more sense, than getting them to provide legal advice and representation to low-income individuals. Non-profits are much more like traditional corporate clients and thus easier to contact and more predictable and with a lower

⁹³³ Abel, “Transnational law practice,” 73.

risk profile than individual clients. Crucially, they do not require law firms to “make that leap from the corporate world to the community” as one lawyer put it.⁹³⁴

There is one final point to note: in the years following the launch of the PILnet clearinghouses and the launch of several of the domestic clearinghouses and the Forum, copycat or “me-too” clearinghouses began to emerge at the international level, such as A4ID, TrustLaw and i-Pro bono. This is perhaps unsurprising given that PILnet was receiving substantial funding from the firms (hundreds of thousands of dollars per year). It would not be accurate to say that they were all in it for purely funding-related reasons. TrustLaw, for example, is a corporate foundation, although A4ID charges both firms and non-profits substantial membership fees. What can be said quite confidently, however, is that most clearinghouses have focused on the PILnet model of Big Law Pro Bono, i.e. connecting Big Law with non-profits in need of legal assistance. These clearinghouses have not focused so much on European human rights and public interest lawyering, in the way that PILnet had, but on other non-profit needs (such as corporate support).

2 What happened to individual access to justice?

There remains one significant unanswered question in the analysis provided in this chapter so far. Given that, as discussed in Chapter 3, the originators of the European public interest law movement were explicitly focused on legal aid within the public sector (i.e. increased access to justice for the legally needy), as one core strand of that movement, why did this focus not get transmitted through PILnet (and other non-profits and legal actors emerging from the movement) to Big Law Pro Bono Practice in Europe? One likely answer is that, when advocating for individual access to justice in Europe, those involved in the European public interest law movement promoted largely European (and not American) models of pro bono service provision, models that relied upon the state and the Social Bar to provide legal aid and not on private voluntarism (as was the dominant model in the US, from the late 1980s and early 1990s). Consequently, by the time the Big Law Pro Bono entrepreneurs were getting organized in Europe (between 2005 and 2007), the European pro bono movement had made significant gains in institutionalizing the state-funded, Social Bar-oriented model of legal aid provision in

⁹³⁴ Interview number 44, June 17, 2016.

Central and Eastern Europe and so there was no thought of deploying Big Law Pro Bono to that end. This final section will explore this outstanding question in more detail and the hypothesized answer just presented.

2.1 State-funded legal aid and the “Social Bar”

As discussed in Chapter 3, throughout the 20th century, a principle had emerged in Western Europe (often in constitutional form), that the state is obliged to “affirmatively and effectively guarantee the right of *all* to competent legal assistance”.⁹³⁵ By the beginning of the 21st century, most European countries had taken steps to realize this principle and settled on some variant of what has been referred to as the “judicare” model of legal aid (i.e. where the state subsidizes private lawyers to undertake legal aid work, rather than employing its own state lawyers – as was done, to an extent, in the US during the 1960s and 1970s).⁹³⁶ This meant that while the private legal profession remained involved in the provision of legal aid to the poor, it was no longer doing so on a pro bono basis (as in the 19th and early 20th centuries) and the expectation was established, that the state should subsidize private lawyers for this work. It is also important to note that very often, of course, it was the private legal professions themselves or the social workers and civil society actors with whom they were collaborating that had lobbied the state for legal aid in the first place. Each group was pursuing their own interests and vision for state-sponsored legal aid and all felt overwhelmed by the burden that fell to them (particularly after the Second World War).⁹³⁷

Whatever the case, this shift in the conception of legal aid from an honorific duty of the profession to an obligation of the state (at least as financier) is crucial in the history of pro bono practice in Europe; this development, to an extent, displaced the pro bono ethic within the profession. One commentator on the English legal profession suggested that it was the Second World War and the subsequent rollout of state-sponsored legal aid that led to a decline in “the profession’s sense of responsibility for “Poor Man’s Law””.⁹³⁸ It is possible, in the words of that commentator, that, “legal aid conferred on legal aid practitioners, and on the profession in

⁹³⁵ Cappelletti and Gordley, “Legal Aid,” 379.

⁹³⁶ Commencing in 1965 in the US with the establishment of the Legal Services Program of the Office of Economic Opportunity.

⁹³⁷ See, generally, Abel, “Law without politics,” but especially 499–510; and Cohn, “Legal aid for the poor,” 250, 256.

⁹³⁸ Boon and Whyte, “Charity and Beating,” 175.

general, an aura of public service that did not rely on *pro bono publico*.”⁹³⁹ However, the argument could be made that this logic was emerging right across Europe throughout the 20th and 21st centuries. As states began to subsidize lawyers to provide legal aid, markets in the provision of legal aid services materialized and consequently also specialization within the profession and the emergence of a functionally and structurally distinct “Social Bar”,⁹⁴⁰ i.e. the specific group of specialized private and/or public lawyers, receiving government subsidies, to whom the task of providing legal aid is delegated (rather than the profession as a whole). Such lawyers develop practices that concentrate around, welfare and benefits, family law, immigration law, criminal law, employment and housing.

Of course, the size of the Social Bar varies dramatically between European countries. In some countries, there is a discernible segment of the private profession that has clearly specialized in legal aid work, whereas in others there remains broader engagement in legal aid work across the profession (see Figure 6 below). Whatever the case, it is clear that specialization has been underway across Europe for some time. It has been observed that lawyers will only be able to handle legal aid work in a profitable manner “through mass production”.⁹⁴¹ Consequently, specialization is inevitable. Trends pointing towards the declining proportion of national legal professions that engage in legal aid work further hint at specialization over the years. In the Netherlands, for example, the percentage of lawyers engaged in the provision of legal aid as a proportion of the total legal profession dropped from around 85% in the mid-1980s to 44% in 2012.⁹⁴² Meanwhile in Britain, the figure (for solicitors acting in civil legal aid matters) dropped from around 60% in the mid-1960s to 24% in 2016.⁹⁴³

⁹³⁹ This was certainly the case in England where the 1949 Legal Aid and Advice Act established a significant legal aid system as a pillar of the welfare state. Similar developments can be noted in the Netherlands with the passing, in 1957, of the *Wet op de rechtsbijstand aan on- en minvermogenden* (Legal Aid for Indigent Persons Act). See Boon and Whyte, “Charity and Beating,” 175; and Huls, “Pro Deo Practice,” 334.

⁹⁴⁰ The Social Bars of Europe have become organized, forming associations for legal aid lawyers, family lawyers, children’s rights lawyers, immigration lawyers, and so on. The Social Bars are typically not only functionally, but also structurally, differentiated from the remainder of the legal profession, often receiving far lower levels of remuneration, being geographically situated in poorer neighborhoods or outside capital cities. This was all highlighted by Abel in 1984 but remains true today across Europe. See Abel, “Law without politics,” 513–19.

⁹⁴¹ *Ibid.*, 561.

⁹⁴² For the 1983 figure see, *ibid.*, 507.

⁹⁴³ For the 1966 figure see, *ibid.*, 508.

Figure 6 – Percentage of lawyers engaged in legal aid work (as a % of the total legal profession)

France ⁹⁴⁴	48%
Netherlands ⁹⁴⁵	44%
Spain ⁹⁴⁶	28%
England & Wales ⁹⁴⁷ (civil only)	24%
Belgium ⁹⁴⁸	24%
Latvia ⁹⁴⁹ (civil only)	10%
Hungary ⁹⁵⁰ (civil only)	4%

The argument could be made that, over time, two key developments have taken place profoundly impacting on pro bono practice in Europe. Firstly, large portions of the European legal professions (those lawyers not financed by the state) unburdened themselves of their duties to the poor and legally needy (direct individual access to justice). Secondly, those lawyers who were engaged in the provision of legal aid work, the Social Bar, came to expect that the state should remunerate them for this work.⁹⁵¹

While these developments had taken root in much of Western Europe between the 1920s and 1970s, it was not until after the fall of the Berlin wall that Central and Eastern Europe began to follow suit. As discussed in Chapter 4, socialist rule had flattened the legal professions of

⁹⁴⁴ Figures for 2012–13. See Belgium, “National Report,” ILAG, Den Haag, 2013, 5.2.2.

⁹⁴⁵ Figures for 2014–15. See the Netherlands, “National Report: Legal Aid in the Netherlands – a broad outline – 2016,” Den Haag, 2013, 29.

⁹⁴⁶ Figures for 2014–15. See “A Survey of Pro Bono Practices and Opportunities in 84 Jurisdictions,” prepared by Latham & Watkins LLP for the Pro Bono Institute (March 2016), 616.

⁹⁴⁷ Figures for July 2016. Based on the number of solicitors’ firms engaged in civil representation work. See SRA, Legal Aid Statistics England and Wales, July 2016; SRA, Regulated Population Statistics (Solicitors), July 2016.

⁹⁴⁸ Figures for 2012–13. See Belgium, “National Report,” ILAG, Den Haag, 2013, 5.2.2.

⁹⁴⁹ Figures for 2012–13. See Latvia, “National Report,” ILAG, Den Haag, 2013, 7.

⁹⁵⁰ Figures for 2007–08. See Pardavi, “Legal Profession in Hungary,” 16.

⁹⁵¹ Of course, although the emergence of state-sponsored legal aid and the Social Bar was a central trend across Europe during the twentieth and twenty-first centuries, there were exceptions. In Poland and Belgium, truly organized state-subsidized systems of legal aid have never fully taken off and the legal aid system remains largely dependent on the goodwill and administration of the national and local bars and the courts. See Gibens and Hubeau, “Socially responsible legal aid,” 67–86; and Gibens and van Houtte, “More effective legal aid.”

Central and Eastern Europe, rendering the legal services so cheap as to make questions of pro bono and legal aid almost irrelevant. Priority, during the socialist period, was placed on technical professions such as doctors and engineers, and law student numbers plummeted right across the region as compared to pre-war figures. (In Hungary there was a five-fold decrease.)⁹⁵²

In some countries, as in Czechoslovakia, quotas were introduced on the number of law students.⁹⁵³ This meant that by the late 80s the legal professions of CEE were often both smaller in size and relatively older than the legal professions of Western Europe. In addition, the legal profession, in many cases, was split between, “attorneys”, providing advice to individuals, and so-called “legal advisors” working for state companies, meaning that there were many lawyers with no experience whatsoever of providing legal advice to individuals.

Following four decades of socialist rule, the overall structure of the legal profession and the political and economic environment in which lawyers operated had changed significantly, meaning that the extent to which the national bar organizations could effectively carry out what had been their honorific duty before socialist rule, was degraded. Firstly, closed societies and reliance on the state for social services had created legal professions in which public-spiritedness and civic engagement were not as highly valued as they once might have been.⁹⁵⁴ That the profession was relatively old (in terms of the average age of lawyers) and thus also relatively conservative did not help matters. A second factor was that as these states were embracing market economies, privatization and the influx of foreign firms brought on new and increasingly lucrative opportunities for lawyers opting to practice corporate and commercial law.⁹⁵⁵ Meanwhile, the conditions for public lawyers and general practice private lawyers were dire; the governments were poor, resources scarce, the population was poor and legal services were not a priority.⁹⁵⁶ The outcome, in some cases, was that private lawyers had no interest in

⁹⁵² Kühn, *Judiciary in Central and Eastern Europe*, 49–52.

⁹⁵³ *Ibid.*, 50.

⁹⁵⁴ Interview number 50, June 24, 2016, and number 4, Sept. 25, 2015. There were exceptions, of course. In Poland, for instance, the period following the Second World War was precisely the moment at which segments of the legal profession began to take responsibility for the provision of free legal assistance to certain segments of the population (political prisoners and other persons oppressed by institutions of the Communist state, for instance). See “A Survey of Pro Bono Practices and Opportunities in 84 Jurisdictions,” prepared by Latham & Watkins LLP for the Pro Bono Institute (March 2016), 513.

⁹⁵⁵ Thieroff and Krutina, “Country Report: Czech Republic,” 138–39; Rekosh, Buchko, and Terzieva, “Access to Justice,” 10.

⁹⁵⁶ Rekosh, Buchko, and Terzieva, “Access to Justice,” 4.

and took no pleasure in undertaking pro bono work (or indeed public work in general), particularly where there was a mandatory requirement.⁹⁵⁷ Often pro bono work was reserved (sometimes explicitly, as in Romania) for younger and more inexperienced lawyers.⁹⁵⁸ Moreover, when the professions were unified again (i.e. combining “attorneys” and “legal advisors”), there were many lawyers who, when called upon by the relevant bar organization to undertake mandatory pro bono work, simply had no pertinent legal experience and no exposure to individual clients.⁹⁵⁹ All of this created organized pro bono systems that produced very low standards of service provision for poor clients.⁹⁶⁰

A Romanian commentator writing in the late 1990s put it as follows:

“[A]ttitudes and practice both discourage the [*sic*] legal aid work. The “assigned” lawyers are seen as less professional, and this is largely true if one bears in mind the low quality of their services. No significance at all is given to pro bono work.”⁹⁶¹

It was against this backdrop that foundations, lawyers and non-profits involved in the European public interest law movement began to promote and pursue the ideal of individual access to justice in Europe. The Ford Foundation, in particular, had been interested in individual access to justice outside of the US since the late 1970s when it had funded a global access to justice study coordinated by Mauro Cappelletti at the University of Florence, Italy, the results of which have been relied upon for parts of this thesis (see Chapter 3).⁹⁶² As noted above and in Chapter 3, since 1997, Ford had opened up a funding stream targeted at promoting “public interest law” in Central and Eastern Europe, and promoting access to justice was certainly part of this effort. Other donors had also taken an interest, including the Open Society Institute (OSI). Speaking in 1999, a board member of the OSI noted, “Access to justice is one of the biggest deficiencies of the existing criminal justice systems in Central and Eastern Europe”.⁹⁶³ Meanwhile, a newsletter from OSI’s Constitutional and Legislative Policy Institute (COLPI) describes the

⁹⁵⁷ Thieroff and Krutina, “Country Report: Czech Republic,” 145; Bárd and Terzieva, “Indigent Criminal Defendants,” 238–39; Macovei, “Country Report: Romania,” 204.

⁹⁵⁸ Macovei, “Country Report: Romania,” 199.

⁹⁵⁹ See, for example, Bárd and Terzieva, “Indigent Criminal Defendants,” 215; Rekosh, Buchko, and Terzieva, “Access to Justice,” 8, 9. Although, note that legal advisors were sometimes called upon to provide advice to their fellow employees at socialist state enterprises. See Nevai, “Access to justice in Hungary.”

⁹⁶⁰ Thieroff and Krutina, “Country Report: Czech Republic,” 145; Bárd and Terzieva, “Indigent Criminal Defendants,” 238–39; Macovei, “Country Report: Romania,” 204. Although, note that Poland seems to have been somewhat of an exception here; see Rekosh, Buchko, and Terzieva, “Access to Justice,” 7–9.

⁹⁶¹ Macovei, “Country Report: Romania,” 205.

⁹⁶² For an introduction, see Cappelletti and Garth, “Access to justice.”

⁹⁶³ COLPI Newsletter 2, no. 1, Winter 1999, Access to Justice/Free Legal Aid Workshop.

strategy in the following terms:

“[The] long-term goal is to convince governments to assume the responsibility for providing adequate free legal aid... [H]owever, [as] many governments are not yet capable of taking on this task [...] the national Soros foundations could invest their resources in establishing [legal aid] centers which would later become funded by the state budget.”⁹⁶⁴

In essence, the idea was to promote a model not too dissimilar to the Swedish, Dutch and US (during the 60s and 70s) models of organized legal aid that relied on regionally and locally situated legal aid bureaus with paid legal staff (referred to as “staff attorney programs” for civil law and “public defender offices” for criminal law in the US). It is notable that from the very outset, the foundations here looking to the state to solve the problem of individual access to justice and not primarily to the private bar. This was likely, partially, down to the reasons just explored above, i.e. the withering away of public-spiritedness among the private bar and the discrepancy in remuneration available between public and private lawyers.

The foundations pursued this strategy across the region, often working in collaboration with various other local and regional European human rights and public interest law NGOs. In Lithuania, for example, in 1998/1999, OSI co-funded two pilot public attorney offices (based on the public defender model) with the Lithuanian government. COLPI and PILnet (then PILI) also partnered with the Lithuanian Ministry of Justice to draft and put a bill through parliament on legal aid reform (which was later adopted in 2005).⁹⁶⁵

In 2002, PILI and the recently launched Open Society Justice Initiative (OSJI) collaborated with the Polish and Bulgarian Helsinki committees and INTERIGHTS to organize a “European Forum on Access to Justice” in Budapest.⁹⁶⁶ The Forum brought representatives from the European Parliament, Council of Europe and World Bank together with representatives from Ministries of Justice, the judiciary, and civil society from CEE.⁹⁶⁷ Ultimately, the EU included a provision about legal aid into its pre-enlargement checklist.⁹⁶⁸

⁹⁶⁴ Ibid.

⁹⁶⁵ *COLPI Newsletter* 2, no. 3, Fall 1999, Access to Justice/Free Legal Aid.

⁹⁶⁶ Access to Justice in Central and Eastern Europe, European Forum on Access to Justice, organized by the Public Interest Law Initiative in collaboration with the Open Society Justice Initiative, Dec. 5–7, 2002, Budapest, Hungary.

⁹⁶⁷ Ibid., preface.

⁹⁶⁸ Rekosh, “Constructing Public Interest Law,” 95.

In 2005, a follow-up forum was held bringing together 200 participants from 40 countries. It was organized by PILI and OSJI and funded by the EU, the Ford Foundation and Open Society.⁹⁶⁹ In the years following the first forum, the international funding organizations and their local partners had managed to procure significant changes to legal aid regimes across CEE. Particularly in Lithuania, Hungary, Bulgaria and Latvia, big changes were underway in the legal aid systems by 2005, which both PILI and OSJI had “been very actively encouraging”.⁹⁷⁰

In Lithuania, the *Semias* (parliament) had adopted the legal aid reform law in 2005, which had resulted from close cooperation with the OSJI. The law expanded the range of actors entitled to provide legal aid beyond private lawyers to include “public institutions”.⁹⁷¹ To this end, the law provided for the establishment of a network of public legal aid offices (building on the public defender pilot offices launched with the support of Open Society) to be administered by the Ministry of Justice.⁹⁷² The law established that legal aid should encompass both “primary” services (advisory and out-of-court legal work) and “secondary” services (representation in court proceedings).⁹⁷³

Meanwhile, in Hungary, a 2003 civil legal aid law had been passed that had established a national legal aid system largely fashioned after the Dutch and English models. The law removed the mandatory requirement for all lawyers to provide legal aid on a voluntary basis and created a national legal aid service with national and regional offices.⁹⁷⁴ The offices were to receive requests from legal aid applicants and filter them and determine in advance the number of subsidized hours of legal service that would be offered.⁹⁷⁵ Following this, an approved legal aid client could choose between competing private lawyers (and also a few NGOs and university law clinics) who had contracted with the Ministry of Justice.⁹⁷⁶

In 2006, again following support from the OSJI, Bulgaria had passed a legal aid law establishing a system similar to that adopted in Hungary. Again, the OSJI, along with other

⁹⁶⁹ Access to Justice in Central and Eastern Europe, 2nd European Forum on Access to Justice, organized by the Public Interest Law Initiative in collaboration with the Open Society Justice Initiative, Feb. 24–26, 2005, Budapest, Hungary, Forum Report.

⁹⁷⁰ *Ibid.*, 1.

⁹⁷¹ *Ibid.*, 10, 11.

⁹⁷² *Ibid.*

⁹⁷³ *Ibid.* 10.

⁹⁷⁴ *Ibid.*, 13–14.

⁹⁷⁵ *Ibid.*

⁹⁷⁶ *Ibid.*

actors, had helped in advance by producing a report with the Bulgarian Ministry of Justice and the Bulgarian Bar setting out “basic principles that should underlie the legal aid system in order to conform with the European Convention on Human Rights, as well as with the requirements for EU accession, and outlining some options for legal aid reform.”⁹⁷⁷ In addition OSJI had played a significant role in drafting the legal aid law and had been involved in creating a pilot legal aid bureau.⁹⁷⁸ Similar legislative developments unfolded in Slovakia (2005), Latvia (2006), Georgia (2007), Moldova (2007) and Ukraine (2011).⁹⁷⁹

At the moment that the market for Big Law Pro Bono was emerging in continental Europe, and the service was being defined (i.e. between 2005 and 2007), the question of how to tackle the need for individual access to justice had already been answered by those engaged in the European public interest law movement. The foundations, human rights and public interest law NGOs, and also PILnet, had decided that securing individual access to justice was the responsibility of the state and had already made significant gains in codifying and institutionalizing this principle. These gains would lead to the countries of Central and Eastern Europe deploying the same “judicare” model of legal aid that was being deployed across much of Western Europe: a model that relied on the functional separation of responsibilities within the legal profession, whereby a Social Bar, compensated by the state, would take responsibility for meeting the legal needs of the poor; a model that exempted large portions of the Bar from engaging in pro bono work for individuals; a model that saw no role for Big Law in relation to individual access to justice.

Taken together with the resistance from the local bars, the unique organizational capital of PILnet and the relative ease of working with non-profits for Big Law rather than individual clients, this goes some way to explaining why individual access to justice was simply not on the agenda of PILnet in the context of its work to develop a market for Big Law Pro Bono in the early 2000s. However, there remains one final point to discuss before we conclude this chapter, somewhat of a postscript. In recent years, there has of course been a significant roll-back of legal aid, certainly across North Western Europe. By 2010, the decline in the economies

⁹⁷⁷ Ibid., 12.

⁹⁷⁸ Ibid., 12–13.

⁹⁷⁹ Slovakia: Act No. 327/2005 on the provision of legal aid to persons in material need (Legal Aid Act); Latvia: Act on State Legal Aid, Cabinet Regulation No. 920 of Nov. 6, 2006 on forms of legal aid; Georgia: Law of Georgia on Legal Aid No. 4955, July 2, 2007; Moldova: Law No. 198-XVI of July 26, 2007 on state guaranteed legal aid; and Ukraine: Law No. 3460-VI of June 2, 2011 on free civil legal aid.

of Europe, consequent upon the economic downturn and the climate of austerity, had begun to have a negative impact on a number of legal aid systems. Several state-funded legal aid schemes came under sustained attack and entered a period of decline in relation to both eligibility and budget, resulting in a trend of increasing contributions expected from the legal aid clients themselves.⁹⁸⁰ This has certainly been the case in the Netherlands, Sweden and England (not by accident, the European countries that have historically had the highest legal aid budgets per capita – see Figures 7 and 8 below) but also, increasingly as a result of austerity, in Portugal, Belgium, Greece, Ireland, Cyprus and Germany.⁹⁸¹ All manner of substantive areas of law have been removed from the scope of legal aid across Europe, from personal injury and employment to immigration, consumer rights and housing.⁹⁸²

Beyond this there were other factors contributing to declining access to justice for persons of low income across Europe. For example, in the Netherlands, the early 2000s also saw a declining interest among Dutch lawyers in joining the Social Bar, meaning that demand for legal aid was often harder to satisfy as there simply were not enough lawyers willing to take on legal aid work. This also resulted in a decrease in quality of legal aid services as inexperienced lawyers were increasingly carrying out the work.⁹⁸³ Meanwhile, in many jurisdictions, including Spain, Portugal and Italy, the cost of justice for individuals has increased by way of the introduction of VAT on lawyers' fees or the raising of court costs.⁹⁸⁴

⁹⁸⁰ Barendrecht et al., "Legal aid in Europe," 81.

⁹⁸¹ Fundamental Rights Agency, Annual Report: Challenges and Achievements, 2012, 243; *ibid.* 2013, 192; Council of Europe Commissioner, "Safeguarding human rights in times of economic crisis," issue paper, December 2013, 22, <https://wcd.coe.int/ViewDoc.jsp?id=2130915>; "Legal aid cuts: The forgotten pillar of the welfare state – a special report," *Guardian*, September, 2014, <http://www.theguardian.com/law/2014/sep/25/-sp-legal-aid-forgotten-pillar-welfare-state-special-report-impactcuts>; Tamamović, "Crisis on fundamental rights," 99, 100.

⁹⁸² Barendrecht et al., "Legal aid in Europe," 81.

⁹⁸³ Van den Biggelaar, "Legal aid in the Netherlands," 94–95.

⁹⁸⁴ Tamamović, "Crisis on fundamental rights," 105, 106.

Figure 7 – *Comparative per capita European Civil Legal Aid Spending in 1989/1990 (Dollars)*⁹⁸⁵

England	\$14
Netherlands	\$9
Sweden	\$7
Germany	\$4
Spain/France	\$1
Italy/Belgium	Charity

Figure 8 – *Comparative per capita European Legal Aid (criminal + civil) Spending in 2012/2013 (Euros)*⁹⁸⁶

England & Wales	€39
Netherlands	€29
Ireland/Finland/ Belgium/Germany	€7
France/Poland	€0,6

The climate of austerity has resulted in increasing calls from European governments (e.g. Ireland, Britain, Belgium, Sweden) for the legal profession, beyond the Social Bar, to contribute more to the legal aid system either by contributing financially to legal aid resources or by actually doing pro bono work.⁹⁸⁷ However, the Social Bar has reacted indignantly to such proposals and to the cuts and spending freezes that have been introduced in recent years. Legal aid lawyers have been going on strike in the Netherlands, France and Great Britain while there have been complaints about the level of pay virtually across the board in Europe.⁹⁸⁸

In the UK, severe cuts to civil legal aid were introduced by way of the 2012 Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act. In 2015, Justice Secretary, Michael

⁹⁸⁵ See Cooper, “English Legal Services,” 254.

⁹⁸⁶ See Barendrecht et al., “Legal aid in Europe,” 5.

⁹⁸⁷ Cousins, “Legal Aid Reform,” 144; “Michael Gove: Wealthy lawyers should do more free work for the justice system,” *Telegraph*, June 23, 2015; Barendrecht et al., “Legal aid in Europe,” 86; Regan, “Legal aid,” 391.

⁹⁸⁸ Barendrecht et al., “Legal aid in Europe,” 84–88.

Gove, caused a great deal of commotion by suggesting that lawyers who have “done very well” needed to “look into their consciences” and do more work for free to shore up the “less well-funded areas of law”.⁹⁸⁹ While Big Law initially responded indignantly by pointing to the pro bono work they already do, in the last couple of years, commencing even before such public rebukes, they have begun to answer the call by establishing a “Collaborative Plan” (an initiative of nearly 40 of the largest City-based firms aimed at improving access to justice (defined narrowly) through pro bono in the UK).⁹⁹⁰ The UK Collaborative Plan for Pro Bono, was launched in 2014 following PILnet’s London Pro Bono Forum and saw the firms making a collective commitment to “ensur[e] that a proportion of their pro bono work [was] directed to promoting access to justice for low income individuals”.⁹⁹¹ By working together, the firms hope to “more effectively promote access to justice” in the UK. There are a number of core strategies articulated within the plan (including information sharing and the setting of a voluntary and aspirational pro bono target of 25 hours of pro bono per fee-earner per year). However, the most interesting development is probably the commitment (mentioned above) by all firms to “ensur[e] that a proportion of their pro bono work is directed to promoting access to justice for low income individuals”. This broad commitment includes the following sub-commitments:

- Support legal aid and promote the importance of a properly funded legal aid system.
- Continue to support advice clinics and seek to develop end-to-end representation in appropriate circumstances.
- Create Task Forces focusing on subject areas (e.g. immigration) or demographic populations (e.g. homelessness) to assess the need for pro bono intervention and to share information between firms working on similar issues.
- Create handbooks specific to legal clinics by subject area (e.g. housing, immigration, welfare).
- Improve systems and processes for working more closely with barristers on pro bono matters.
- Work as a group to learn from experiences, create opportunities for smaller firms to get involved and spread the cost of providing training and resources to all participants.

⁹⁸⁹ “Michael Gove: Wealthy lawyers should do more free work for the justice system,” *Telegraph*, June 23, 2015.

⁹⁹⁰ See <http://news.trust.org/spotlight/Collaborative-Plan-for-Pro-Bono-uk/?tab=background>.

⁹⁹¹ *Ibid.*

- Create a ‘trusted referral network’ to pass cases to other law firms (e.g. if one firm cannot act due to a conflict).
- Promote the Task Forces and opportunities to set up new clinics, encouraging involvement from other law firms.
- Implement structures and help to build supervisory capacity of external agencies to develop end-to-end casework for individuals.⁹⁹²

Through this plan, the firms have managed to increase the percentage of pro bono work carried out directly for low-income individuals, as opposed to non-profits, from 14% in 2017 to 27% in 2018.⁹⁹³

This is certainly an intriguing development. However, it must be noted that, firstly, the Collaborative Plan is limited to the work undertaken by the firms in the UK and does not extend to their European offices. Secondly, despite cuts and restrictions placed on legal aid in several other European countries (as discussed above) and the much lower spending on legal aid across much of Central and Eastern Europe (and consequently significant gaps in access to justice for low-income individuals), there are as yet no similar developments across the rest of Europe (either in terms of firm commitments or a compelling call from the government or organized bar for firms to make such commitments). However, most recently, in November 2018, the Dutch Minister for Legal Protection, Sander Dekker, after threatening legal aid cuts, has openly called on commercial law firms do their part to ensure the proper functioning of the legal aid system (without specifying precisely what this means).⁹⁹⁴ However, unlike in the US or the UK, I am aware that the local bar in the Netherlands is entirely opposed to any proposal that would engage Big Law in “legal aid” work (the bar being mostly controlled by “social lawyers” i.e. doing legal aid work). Commercial firms in the Netherlands have reacted as in the UK (discussed in Chapter 4), by pushing responsibility for legal aid back on the government.⁹⁹⁵

The question thus remains, as to whether developments such as growing legal aid cuts, the appointment of a critical mass of full-time pro bono roles on the Continent and greater penetration of the local legal fields could be anticipated across the rest of Europe (as in the

⁹⁹² Ibid.

⁹⁹³ Collaborative plan statistics for 2018 (on file with author).

⁹⁹⁴ See: <https://www.mr-online.nl/de-brauw-rechtsbijstand-gaat-alle-advocaten-aan/>

⁹⁹⁵ Ibid.

UK). Only time will tell; however in light of the analysis presented in this chapter, I am convinced it is unlikely that Europe will, any time soon, follow exactly the same path.

3 Conclusion

In this chapter, we had one core aim: to analyze why Big Law Pro Bono in Europe has been focused, so single-mindedly, on work for non-profit organizations? And why, given the history of pro bono lawyering in Europe and the way Big Law Pro Bono has come to be understood in the US (explored in Chapters 1, 2 and 3) there has been virtually no observable focus on direct individual access to justice in Europe. In so doing, the hope was to explore the localization of Big Law Pro Bono in Europe, to compliment the study of its globalization in the previous chapter.

The analysis in this chapter has pointed to several possible answers to these questions, including: barriers to market access experienced by the initial Big Law Pro Bono entrepreneurs in Europe; the unique profile and networks of those actors who initially developed the market for Big Law Pro Bono in Europe; the legacies of the European civil liberties, human rights and public interest law movements; the resistance of local bars to Big Law engaging in individual client work; the specificities of the type of law firms and lawyers that make up the European Corporate Bar; the relative ease of dealing with non-profit clients as opposed to individual clients; the functional distribution of labor between the Social Bars of Europe and the rest of the legal profession (and the Corporate Bar in particular); and the fact that the problem of individual access to justice (in Central and Eastern Europe) had, in the minds of many of the relevant stakeholders, already been largely solved by the time the market for Big Law Pro Bono was really taking shape on the Continent. Nevertheless, I have also conceded, while suggesting that it was unlikely, that recent developments in the United Kingdom in particular, and across the rest of Europe more broadly, related to both legal aid systems and Big Law Pro Bono practice, leave open the possibility that the current status quo may be revised in the coming years.

Among these factors, arguably the most significant are: firstly, the barriers to market access; secondly, the existence of a strong Social Bar in many European states (and the linked resistance from national Bars to developing Big Law Pro Bono in way that would undermine

legal aid systems and undercut the market share of the Social Bar); and thirdly, the fact that the key organization (PILnet) which helped to build the market for Big Law Pro Bono in Continental Europe, was deeply connected to the European NGO movement and, for historically contingent reasons, viewed the problem of access to justice for individuals (narrow definition) as a problem for the state to solve.

As noted above, among the key factors that may render legal transplants more likely to succeed are: when they are chosen voluntarily after consideration of alternative solutions; when there is affinity between the legal systems of the exporting and importing countries; when there is demand from the recipient country; when legal intermediaries are in position that understand the law and can adapt it to local conditions; and when institutional infrastructures is already in place.⁹⁹⁶ We also noted above the importance, when studying legal transplants, of considering the incentives, attributes, capabilities and limitations of legal elites in differing social, political and legal contexts.

Firstly, if we consider the transplant of Big Law Pro Bono, it was not chosen by European lawyers from among a range of possible solutions. Indeed, there was no clear problem to solve. Of course, there was unmet legal need among both individuals and other consumers of legal services right across Europe, but the question was not framed that way. The objective (of the pro bono entrepreneurs) was to develop pro bono culture within the international offices of major global law firms and the question of legal need (access to justice) was secondary.

If we now consider the affinity between the legal systems of the US and Europe, a major difference, relevant here, is how the problem of access to justice (narrow definition) has been historically solved. In the US (as explored in previous chapters) there is a much smaller role for the state and Big Law Pro Bono in the US has largely expanded to fill that gap. In Europe, a Social Bar has emerged, subsidized by the state, to solve this problem. When transplanting Big Law Pro Bono into Europe, this has proved to be a crucially significant difference affecting how the transplant has unfolded (in the form of resistance from the local Bars to allowing Big Law Pro Bono to encroach on local legal aid systems).

⁹⁹⁶ Berkowitz, Pistor, and Richard, "Economic development, legality, and the transplant effect"; Halliday and Osinsky, "Globalization of law", 458.

If we consider the question of demand for the legal transplant. As just mentioned, of course there was unmet legal need among poor individuals across Europe when the transplant was taking place. However, there was also enormous demand for pro bono legal services among Europe's national and transnational non-profit population and it was thanks to the unique profile of PILnet that the Big Law Pro Bono resource was connected to this demand, subtly altering the form of the legal service being transplanted.

If we consider whether the legal intermediaries (the pro bono entrepreneurs, PILnet, the local clearinghouses set up by PILnet) were in position to understand Big Law Pro Bono and adapt it to local conditions. Certainly, they were in a position to understand Big Law Pro Bono, but they were not in a position to successfully orient it towards individual access to justice in the local legal systems. The pro bono entrepreneurs simply did not have the networks, local legal knowledge or language skills. PILnet had the network (they were connected to local lawyers in the legal aid sector across Europe through the OSF funded legal aid project and the broader European public interest law movement) but did not prioritize that objective as they did not see Big Law Pro Bono as being linked to individual access to justice in a direct manner in Europe. Moreover, PILnet had another more pressing objective i.e. to find a way to make the public interest law organizations and human rights organizations within their network sustainable. The local clearinghouses established by PILnet could have decided to prioritize individual access to justice rather than serving non-profit clients. However, they were strongly influenced by the model already established (very successfully) by PILnet and so probably had little incentive to try and develop another model which, arguably, would have been much harder to develop and in relation to which law firms (i.e. clearinghouse funders) were showing little interest.

Finally, if we consider the institutional infrastructures that were already in place relevant to the transplant. PILnet and the networks that it had in the early 2000s, solved so many problems for the Big Law Pro Bono entrepreneurs. It provided almost all the necessary infrastructure on the demand side of the Big Law Pro Bono marketplace in Europe. Meanwhile, the infrastructure that existed in relation to access to justice for individuals was also significantly developed by the mid-2000s but it had been developed in such a way, that there was no obvious role for Big Law to play.

What the analysis in this chapter has revealed is that, in spite of the strong orientation of the US model of Big Law Pro Bono towards promoting a narrow vision of access to justice, as a globalized resource, there is no reason to think that it should necessarily maintain this functional orientation when translated into new legal and political contexts. The process of localization has the power to transform and re-purpose Big Law Pro Bono. While the internal organization remains broadly the same as in the US (involving the development of pro bono policies, the setting of pro bono targets, the establishment of pro bono committees and the appointment of full-time pro bono professionals engaging fee-earning lawyers in working for free), the end to which the resource is deployed may differ. Big Law Pro Bono in Europe primarily involves the provision of free legal services (chiefly research and operational support) to non-profit organizations that are broadly pursuing norm change via law reform and policy advocacy work. This is an altogether different objective to promoting access to justice for low-income individuals. Taken together with the recent changes underway in the UK, we must conclude that Big Law Pro Bono in Europe appears to be an ideologically indeterminate and historically contingent resource that is taking shape against the evolving political and legal landscape. As in the US, the prevailing legal and political context and the key actors in the pro bono ecosystem (internal and external to the firm) are playing a decisive role in determining how Big Law Pro Bono is being institutionalized in Europe. In particular, intermediary organizations, the organized bar (although through resistance rather than support), the legacy of the civil liberties, human rights and public interest law movements, the prevailing systems of state-funded legal aid and the large population of non-profit organizations engaging in law reform and policy advocacy work targeted at the European Union and Council of Europe institutions, have all played a role in giving a unique shape to Big Law Pro Bono in Europe.

In the following, and final, chapter of this thesis, there remains the question of what this all means. In other words, what are the consequences of the way that Big Law Pro Bono has developed in Europe vis-à-vis access to justice? If, as is claimed in this thesis, Big Law Pro Bono in Europe does not significantly (or even meaningfully) contribute to access to justice in Europe (in the way that access to justice has been defined in the pro bono literature to date), then does it perhaps contribute to access to justice more broadly, as defined in Chapter 2?

CHAPTER 6: Does Big Law Pro Bono contribute to access to justice in Europe? Can it?

As a reminder, the central research question of this PhD thesis is: *does “Big Law Pro Bono” contribute to access to justice in Europe and if not, could it?*

In Chapter 1, we noted that Big Law Pro Bono (rather than merely “pro bono” – meaning lawyers acting outside of the Big Law setting providing free legal services), both as an institutionalized model of social change lawyering and as an object of study, traces its roots largely to the progressive US legal movements (the public interest law movement and the poverty law movement) of the 1960s and 1970s. We also established that the literature on Big Law Pro Bono arose from the literature on the US public interest law movement and the broader literature on public interest law and cause lawyering which flowed from that in the subsequent decades. In Chapter 2 it was also suggested that, within this existing body of literature on Big Law Pro Bono, there is a broad consensus that the primary objective of Big Law Pro Bono is (and should be) to promote access to justice, where this is construed narrowly as the provision of civil legal aid to low-income individuals. It was suggested that the conflation of access to justice with civil legal aid for the poor and underserved in the US literature on pro bono was a consequence of the broader political and legal context within which discussions on pro bono and legal aid have taken place in the US. In particular, the decimation of federally funded civil legal aid between the mid 1970s and the 1990s gave rise to a broader conversation on the legal left about a perceived crisis in access to justice (the “justice gap”). During the 1990s, when pro bono was being rapidly institutionalized in large US law firms, there was a concerted effort from multiple directions (civil society, the organized bar, pro bono professionals, academia) to construct pro bono in general, and Big Law Pro Bono in particular, functionally as a solution to the crisis in civil legal aid. This functionalist understanding of Big Law Pro Bono as a solution to the “justice gap” (both normatively and empirically) persists into the present day within both academic and practitioner circles.

In Chapter 2, it was suggested that there may be limitations in embracing, within literature on pro bono/Big Law Pro Bono, such a narrow definition of access to justice. Firstly, we risk failing to critically evaluate Big Law Pro Bono and its empirical contributions to access to

justice beyond the provision of civil legal aid and secondly, we risk adopting a very limited normative agenda for Big Law Pro Bono and we may fail to perceive its possible contributions to access to justice (and public interest lawyering in general) beyond the provision of civil legal aid. Indeed, a key conclusion from Chapter 4 was that if we define access to justice in the way that it has been defined within the existing body of literature on Big Law Pro Bono, then we must conclude that Big Law Pro Bono in Europe does not meaningfully contribute to access to justice. We suggested that this was odd given that, as explored in Chapter 3, Europe has a long history of pro bono practice within the legal professions, which has primarily been focused on access to justice, defined narrowly in terms of providing legal services to low-income individuals. Why then, would Big Law Pro Bono in Europe not also be oriented towards providing legal aid to low-income individuals? This is even more perplexing given that, as explored in Chapter 4, Big Law Pro Bono has primarily come to exist in Europe by way of the globalization of large US law firms. Why wouldn't the European variant copy the US blueprint? In Chapter 5, we suggested several possible answers to this question, including: barriers to market access experienced by the initial Big Law Pro Bono entrepreneurs in Europe; the unique profile and networks of those actors who initially developed the market for Big Law Pro Bono in Europe; the legacies of the European civil liberties, human rights and public interest law movements; the resistance of local bars to Big Law engaging in individual client work; the specificities of the type of law firms and lawyers that make up the European Corporate Bar; the relative ease of dealing with non-profit clients as opposed to individual clients; the functional distribution of labor between the Social Bars of Europe and the rest of the legal profession (and the Corporate Bar in particular); and the fact that the problem of individual access to justice (in Central and Eastern Europe) had, in the minds of many of the relevant stakeholders, already been largely solved by the time the market for Big Law Pro Bono was really taking shape on the Continent.

There now remains one question: if Big Law Pro Bono in Europe does not contribute to access to justice in the way that this term has been defined within the existing literature on pro bono, might it contribute to a broader notion of access to justice? In Chapter 2, we developed a much broader definition of access to justice embracing not only procedural notions of justice, but also substantive notions of justice both within the legal system and beyond. The objective in this final Chapter is to evaluate to what extent Big Law Pro Bono contributes to access to justice as this was defined in Chapter 2. In the following pages we will evaluate Big Law Pro Bono against the three definitions of access to justice elaborated in Chapter 2: the definition within

the existing literature on pro bono (Section 1); the narrow definition (Section 2); and the wide definition (Section 3). I will also explore other possible contributions of Big Law Pro Bono in Europe, beyond access to justice (Section 4).

1 Pro Bono Literature (PBL) Definition

To recap, the PBL definition, as set out in the first chapter of this thesis, construed access to justice as concerning the accessibility of the processes constituting the administration of justice (rulemaking, rule enforcement and conflict resolution) by individuals. This is perhaps what Cummings has in mind when talks about the “access” dimension of public interest law insofar as it relates to market-based inequality in the access of legal services and orients public interest law towards “providing no-cost or low-cost services to expand the entry of the poor into the legal system on an individual, case-by-case basis”.⁹⁹⁷ Barriers to access to justice will be structural impediments making it impossible or difficult for individuals to directly access the conflict resolution, rulemaking or rule enforcement processes. Barriers may, for instance, be created by a lack of information, a lack of expertise, a lack of money, a disability or by law. Expanding access to justice, defined in this way, involves taking actions that will directly increase the access of individuals to existing (legal, judicial, administrative, etc.) processes. For example, the provision of information, advice or representation to individuals who would otherwise not have the means to effectively engage in the judicial or electoral processes would contribute to access to justice defined in this way. Equally, the removal of a legal prohibition on certain groups of individuals from voting in elections would also contribute to access to justice defined in this way.

Does Big Law Pro Bono contribute to access to justice in Europe, defined in this way? As noted above, based upon the analysis in the previous chapters we must conclude that it does not. Likely less than 15% of Big Law Pro Bono work involves providing legal services directly to individuals in Europe. Among the top 30 commercial law firms, this might amount to less than 20 full time equivalent lawyers working on pro bono over one year. When you consider that there are approximately 8000 legal aid lawyers in the Netherlands, 4000 in Belgium, 25,000 in

⁹⁹⁷ Cummings, “Pursuit of Legal Rights,” 523.

France and even 139 civil legal aid lawyers in Latvia, we must conclude that Big Law Pro Bono makes an almost insignificant contribution to access to justice defined in this way.⁹⁹⁸

This is a fact that many pro bono professionals are aware of and, particularly in London, are taking steps to address. Nicolas Patrick, Pro Bono Partner at DLA Piper, coming from Australia where he suggests that around 60% of Big Law pro bono work is undertaken for low-income individuals, struggles to understand the reluctance in Europe to engage in this kind of work. Patrick suggests that:

“I do not think our pro bono practice can succeed without [individual client] work... when you focus on charities and non-profits, you can get people to do one pro bono matter, but they do not necessarily come back for another one... It is not inspirational... if you get them to do a matter for a person who is being held in immigration detention and they are able to get that person released, they come back for another one because they have had an impact on somebody’s life, they have got them out of detention and back with their families, it’s the sort of thing that makes them want to come back and do more... If you only offer charities work then lawyers may take the view that *‘I did some pro bono work this year, next year I will join the netball team and then I will try something else the year after that’*, it doesn’t really bring them back for more.”⁹⁹⁹

For Patrick, it is not just about inspiring DLA lawyers, but inspiring lawyers in general; “the [European pro bono] movement will not grow off the back of the current strategy rooted in NGOs because it simply doesn’t inspire lawyers and they do not see any real impact.”¹⁰⁰⁰ At DLA, Patrick has done a great deal to put this philosophy into practice; setting up individual client “law clinics” across the UK and across Europe, i.e. collaborations with specialist NGOs or university law schools in which DLA lawyers can volunteer their services, working alongside trained specialists for individual clients with specific legal needs, such as individuals trying to secure disability benefits or migrants seeking reunification with their families.¹⁰⁰¹

⁹⁹⁸ See Belgium, “National Report,” ILAG, Den Haag, 2013, 5.2.2 (figures for 2012–13); the Netherlands, “National Report: Legal Aid in the Netherlands – a broad outline – 2016,” Den Haag, 2013, 29 (figures for 2014–15); Latvia, “National Report,” ILAG, Den Haag, 2013, 7 (figures for 2012–13).

⁹⁹⁹ Interview number 29, Mar. 1, 2016.

¹⁰⁰⁰ Interview number 29, Mar. 1, 2016.

¹⁰⁰¹ See, for example, <http://www.dlapiperprobono.com/what-we-do/work/pro-bono/manuel-bravo.html> and <https://www.dlapiper.com/en/uk/news/2015/12/first-successes-in-our-new-uk-pro-bono-clinic/>.

Diane Sechi, a qualified social welfare lawyer who has been employed directly by Simmons & Simmons to run a social welfare clinic for them in London, also supports this position. This Clinic receives appeals stage referrals from front-line agencies. Says Sechi:

“It is a shift and I think it is a necessary shift [towards helping individuals] because of the way that governments are moving and removing areas of law from scope [of legal aid] and corporate firms have to look at the ways in which they can engage their skills. Yes, they are not trained to do social welfare law but there is no reason why they can’t use their skill set to transfer over. I don’t think you need to build up years and years of experience in one particular area... These lawyers have great analytical skills and fantastic research skills; they have got the skill set there to [adapt]. It’s no bar to them that they have not done social welfare law... Some of the Partners at Simmons & Simmons have been so engaged with a particular case that they themselves have become experts in an area of welfare benefits, so you have a dissemination of knowledge throughout Simmons & Simmons”.¹⁰⁰²

The shift that Sechi speaks of is, at least in the UK, well under way. As discussed in Chapter 5, the UK Collaborative Plan for Pro Bono, which was launched in 2014, saw nearly 40 firms making a collective commitment to “ensur[e] that a proportion of their pro bono work [was] directed to promoting access to justice for low income individuals”.¹⁰⁰³ The Plan commits the firms to an aspirational pro bono target of 25 hours per lawyer per year across the firms’ UK offices and requires them to “ensuring that a proportion of their pro bono work is directed to promoting access to justice for low income individuals”.

Interview subjects, including Nicolas Patrick, who have been directly involved in promoting the push, in London, towards more pro bono work for low-income individuals, all refer to legal aid cuts as the justification for such work although they are very careful to caveat that Big Law Pro Bono cannot and should not replace the existing legal aid system. Based on the historical fears of Big Law in London (explored in Chapter 4) of being saddled with legal aid work and the sheer volume of legal aid lawyers and legal aid work relative to the volume of Big Law pro bono work, it seems highly unlikely that Big Law could ever be a viable substitute to state-

¹⁰⁰² Interview number 44, June 17, 2016.

¹⁰⁰³ See <http://news.trust.org/spotlight/Collaborative-Plan-for-Pro-Bono-uk/?tab=background>.

funded legal aid short of every single Big Law lawyer being required to work part-time in legal aid cases all year-round.

Is it feasible, however, that legal aid cuts across the rest of Europe could have a similar effect on Big Law Pro Bono there, i.e. triggering a shift towards individual access to justice work. As discussed in Chapter 5, this seems unlikely. Despite cuts and restrictions placed on legal aid in several other European countries (as discussed in Chapter 5) and the much lower spending on legal aid across much of Central and Eastern Europe (and consequently significant gaps in access to justice for low-income individuals), there are as yet no similar developments across the rest of Europe (either in terms of firm commitments or a compelling call from the government or organized bar for firms to make such commitments).

As discussed in Chapter 5, between 2008 and 2010, the decline in the economies of Europe had a negative impact on multiple legal aid systems. Several state-funded legal aid schemes came under attack and entered a period of decline (*vis-à-vis* both eligibility and budget) resulting in a trend of increasing contributions expected from the legal aid clients themselves.¹⁰⁰⁴ However, even though this period was exactly the period when Big Law Pro Bono was taking root across Europe, there seems to have been virtually no impact on the way that lawyers engaged in Big Law Pro Bono, legal aid lawyers, governments or European bars think of it as a resource. Even full-time pro bono professionals haven't made any meaningful attempts to reorient Big Law Pro Bono (in Continental Europe) towards promoting legal aid for the poor.

The reason for this is likely that virtually all the Big Law Pro Bono professionals (full-time pro bono managers) with a mandate for Europe are based in London or in the US (as explored in Chapter 4). There are just six such professionals in Continental Europe and the first was appointed only in 2014. Given that, as explored in the previous chapters, Big Law Pro Bono has been a significantly top-down phenomenon, largely led by Americans and Brits, there is very limited penetration of Big Law Pro Bono in Continental European legal culture and practice. It might be fair to say that, at present, there is virtually no link at all between developments within national legal markets in mainland Europe and developments in Big Law Pro Bono.

¹⁰⁰⁴ Barendrecht et al., "Legal aid in Europe," 81.

Even if firms decide, as a policy, to promote one approach to pro bono (e.g. oriented towards the provision of civil legal aid) in every single office, without having full-time pro bono managers on the ground, qualified in the relevant jurisdiction and able to lobby local bars and other stakeholders to institutionalize such a model (beyond the firm), it is highly doubtful that firms would be able to implement such a policy. Getting commercial lawyers to work directly for low-income individuals where they have no practice of doing so and limited inclination to do so is easier said than done. Such work requires an entire infrastructure, as now exists in the US, of supportive civil society organizations and organized bars. At present this does not exist in Europe and, to the contrary, the current ecosystem is hostile to the idea. Short of a locally led movement among lawyers and other stakeholders within relevant jurisdictions (as is happening in London where there is now a large body of pro bono professionals), it is hard to see how this could happen. Consequently, we should not expect a greater engagement of Big Law Pro Bono with access to justice, defined in this way, unless a significantly greater penetration of national European legal markets is achieved by Big Law Pro Bono on the Continent, (as has been achieved in London).

2 Narrow definition

The narrow definition of access to justice, includes the PBL definition but is broader. Like the PBL definition, the narrow definition also poses the question, ‘*what structural impediments exist that render it difficult or impossible for individuals to access the conflict resolution, rulemaking or rule enforcement processes?*’ This still relates broadly to what Cummmings refers to as the “access” dimension of public interest law i.e. insofar as it relates to market-based inequality in the access of legal services. However, unlike the PBL definition, contributions to access to justice may also be *indirect* and may also be targeted at *groups or civil society organizations*, rather than solely at individuals. So, this might include pro bono work that simply expands the access to law for civil society organizations (that otherwise would struggle to access legal services) for their corporate legal needs i.e. contracts, governance, data protection, employment advice, etc. However, it might also include pro bono work that indirectly contributes to access to justice for individuals. For example, conducting research into difficulties experienced by persons with disabilities when making use of the court system or participating in the electoral process may contribute to access to justice but will not, without further action, do so directly. Therefore, while such research would not contribute to access to

justice in the PBL definition, it would do so in the narrow definition. Similarly, a test case that sought to establish the requirement of law enforcement officers to make reasonable accommodations when questioning criminal suspects with disabilities or an advocacy campaign promoting the right of children to be heard during the course of criminal or civil proceedings affecting them or promoting the right of civil society organizations to participate in the policy process, would *not* qualify as promoting access to justice defined along the PBL lines, but *would* come within the narrow definition.

The argument I wish to make here, is that a large bulk of Big Law Pro Bono work carried out in Europe contributes to access to justice in the narrow definition (but not the PBL definition). This is because, a great deal of Big Law Pro Bono facilitates non-profits: a) to simply be more robust and more compliant as legal entities; and b) to more effectively engage in the policy, judicial and legislative processes. The purpose of such work might be described in procedural terms, similar to how lawyers spearheading the early public interest law movement in the US described their own objectives, i.e. “to provide legal representation to interests that [are] unrepresented and underrepresented in the legal process.”¹⁰⁰⁵

Dealing first briefly with the former, a significant amount of Big Law Pro Bono work in Europe involves the provision of “corporate support” i.e. legal assistance provided to non-profits as incorporated legal entities, relating to their legal structure and governance, employment practices, tax obligations, financing, intellectual and real property rights, commercial transactions and so on. Although there are no reliable statistics, it is likely that such work makes up a significant proportion of the pro bono work being carried out by large firms across Europe. The Legal Needs survey I carried out among EU policy NGOs revealed that 63% of the surveyed organizations expressed a need for pro bono support in relation to governance and corporate legal issues, while 61% expressed a need for support with employment issues, 53% with tax and 43% each with respect to data protection and intellectual property issues.¹⁰⁰⁶ Beyond such indication of demand, anecdotal evidence, based on discussion with pro bono managers, indicates that possibly up to half of all pro bono work carried out by Big Law in Europe might consist of this kind of work, both for international and domestic NGOs.

¹⁰⁰⁵ Council for Public Interest Law, *Scales of Justice*.

¹⁰⁰⁶ Khadar, *Good Lobby Legal Needs Survey*.

In recent years, such work has taken on new significance with the so-called “closing space for civil society”. In recent years, there has been a wave of government-sponsored efforts to undermine NGOs through propaganda efforts, regulatory controls and coercive measures in what has been called a “global war on NGOs.”¹⁰⁰⁷ Governments have shut down a large number of groups, and violent attacks against individual human rights defenders are on the rise.¹⁰⁰⁸ In 2015 and 2016 alone, the International Center for Not-for-Profit Law (ICNL) tracked the adoption of 64 laws that restrict the ability of CSOs to register, protest or receive international financial support (16 of which in Europe).¹⁰⁰⁹ Such measures have included the imposition of burdensome bureaucracy and fees, denial of registration, imposing requirements related to property ownership, limiting permissible activities, concocting grounds for dissolution, carrying out raids and lock-outs, applying sanctions, placing restrictions on foreign funding, limiting interaction with foreign entities, limiting freedom of assembly and freedom of expression online and offline (to provide just a few examples).¹⁰¹⁰ One consequence of this has been a number of NGOs increasingly demand pro bono support with respect to ensuring, compliance with rapidly changing national regulatory frameworks, seeking to challenge restrictive measures imposed on them or seeking to completely relocate to more favorable jurisdictions (Amsterdam, Berlin, Vienna, London etc.). One example of this trend is the collaboration between the European Center for Not-for-Profit-Law and law firms, DLA Piper and Dentons to prepare a multi-jurisdictional guide for NGOs on corporate legal structure (what to consider when relocating from one jurisdiction to another).¹⁰¹¹ Undoubtedly such work should be construed as contributing to access to justice if we construe access to justice in terms of expanding access to lawyers and legal services.

Dealing now with the second way in which Big Law Pro Bono contributes to access to justice defined narrowly, several interrelated trends, not least the emergence of supranational and international institutions, jurisdictions and tribunals, have made it simultaneously harder and

¹⁰⁰⁷ Rekosh, Khadar, *The Business Case*, 8, citing The Washington Post Editorial Board, “The Global War Against NGOs,” Washington Post, 10 December 2015.

¹⁰⁰⁸ Ibid.

¹⁰⁰⁹ International Center for Non-for-Profit Law, “*Survey of Trends Affecting Civic Space: 2015-16*”, Global Trends in NGO Law Vol. 7, No. 4 (2016), <http://www.icnl.org/research/trends/trends7-4.pdf?pdf=trends7-4>.

¹⁰¹⁰ DLA Piper internal memo, “The Closing Space for Civil Society: Legal Obstacles to Non-Governmental Organizations” (on file with author).

¹⁰¹¹ European Center for Not-for-Profit-Law, “*Handbook on Registering a Civil Society Organization*”, <http://ecnl.org/publications/handbook-on-registering-a-civil-society-organization/>.

more important for civil society actors to participate in the legislative, judicial and policy processes and to effectively influence decision makers in Europe.¹⁰¹²

Since the establishment of the Permanent Court of Arbitration in 1899, there has been a mushrooming of international and supranational courts. There are now more than 20 permanent international courts and tribunals dedicated to resolving disputes between States and international organizations.¹⁰¹³ Beyond this, there are scores of international institutions with various judicial, legislative and policy-making functions. In Europe, these trends are exemplified by the emergence of the EU legal and institutional order, characterized by a plurality of sources, judicial authorities, and the introduction of new, increasingly technocratic, modes of governance that have profoundly shaped the nature and practice of the law and policy.¹⁰¹⁴ Not yet a fully-fledged federation but more than simply a means of international collaboration, the EU infrastructure has come to be a centrifugal force acting on an ever-increasing range of issues both within Europe and beyond. The supranational EU governance structure and its major institutions have become immensely powerful. They now play a big role in shaping the everyday experience of living in Europe. The rising power and importance of the EU institutions have also given rise to an expansion of financed lobbying activity in Brussels, which increasingly begins to resemble DC. From tobacco companies and food manufactures to airlines and banks, Big Business is now very keen to have the ear of the EU institutions and is not afraid to invest vast sums of money to ensure favorable policy outcomes.¹⁰¹⁵ In Europe, the EU legal and institutional order is made all the more complex by its coexistence with other international bodies and institutions emerging out of agreements both among EU member states and other governments and between the EU and third countries as well as international organizations. Such institutions, for example, the World Trade Organization (WTO) and Council of Europe (CoE) have their own dispute resolution mechanisms, generating overlapping norms.

This relentless growth and complexification within the international judicial and policy sectors have been accompanied by a second and related trend: the internationalization and Europeanization of the European legal fields. By "internationalization" and "Europeanization",

¹⁰¹² Part of the following passages appear in Alemanno and Khadar, *Reinventing Legal Education*, 1–26.

¹⁰¹³ See, for example, Romano, Alter, and Shany, *Handbook of International Adjudication*.

¹⁰¹⁴ Scott and Trubek, "Mind the gap," 1–18.

¹⁰¹⁵ Coen, "Business lobbying in the European Union," 145–69.

I imply both the intrusion of international and European law into an increasing array of substantive legal fields and the convergence of domestic legal systems. For instance, as European Union law has come to affect virtually all areas of the national legal systems, including constitutional and administrative law, immigration law, private law, as well as criminal law, this has simultaneously had the effect of harmonizing national legal systems. As a direct consequence, legal problems are no longer neatly confined to national jurisdictions, exclusively governed by domestic law. International and European law increasingly controls what might have been previously labeled as purely internal or domestic situations. In this way, state sovereignty is continually undermined.

Furthermore, principles, norms and rules emanating from diverse sources and operationalized by a panoply of public and private actors at local, national, regional and global levels populate a complex and globalized legal world. In addition, these processes of internationalization and Europeanization occur – although to a different extent – within and across legal fields, such as commercial, environmental, human rights, financial, criminal and labor law.¹⁰¹⁶

Ultimately then, we are left with a legislative, judicial and policy landscape in Europe characterized by vertical plurality (i.e. the overlap and interaction between local, national, European and international norms and norm-generating bodies), horizontal plurality (i.e. the growing relevance of norms generated in all parts of European rights across Europe: so that norms generated in Hungary or Sweden can be significant in Latvia or Italy) and intense complexity, such that there are simultaneously multiple avenues for engaging in the legislative, judicial and policy processes (litigation, administrative actions, consultations, petitions, etc.) and significant specialization within various fields (environmental law, asylum law, discrimination, labor and social law, free movement law, etc.).

For non-profits and civil society organizations this landscape makes it all the more important to engage. Firstly, such powerful institutions can have dramatic effects on society, for better or worse. Secondly, reforms and policy changes in one part of the system can have an impact across the whole system, making the stakes of engagement much higher. However, engagement is also rendered much more difficult. Significant sophistication is required to engage effectively both in terms of access to comparative legal and policy knowledge and in terms of

¹⁰¹⁶ Snyder, “Economic globalization and the law,” 627.

specialized knowledge or expertise in relation to the various avenues of participation and substantive bodies of law and policy.

In this context, Big Law Pro Bono plays an important role by facilitating non-profits to effectively engage in the legislative, judicial and policy processes. Without access to specialized and comparative legal expertise and knowledge, non-profits simply cannot effectively engage and with limited budgets, they often simply do not have access to such resources. Moreover, European non-profits rarely have sufficient legal staff in-house. The survey among 100 EU policy NGOs revealed that just 32% of them had lawyers on-staff (50% of those with just 1 lawyer) and several of those lawyers were either exclusively or additionally handling compliance and operational or corporate matters rather than contributing to advocacy campaigns and programmatic work.¹⁰¹⁷ Meanwhile, in comparison, a 2004 survey among around 300 public interest NGOs in the US revealed that over 50% of them had more than 5 lawyers on staff (40% having ten or more lawyers on staff).¹⁰¹⁸

Perhaps unsurprisingly then, as discussed in Chapter 4, the interviews undertaken for this thesis suggest that legal research - typically comparative legal research - forms a very large part of the pro bono work that goes on across Europe. Lending support to this anecdotal evidence was a survey carried out among 100 NGOs listed in the European Transparency Register which revealed that just under 80% of them were interested in receiving (or had received) pro bono “legal research” assistance.¹⁰¹⁹ This made legal research the most popular form of pro bono legal assistance by a margin of over 15% (followed by “governance/corporate”).¹⁰²⁰ The need for comparative research is perhaps also unsurprising given the above described normative plurality which is reinforced by several legal doctrines originating in both the European Union and the Council of Europe (via the jurisprudence of the European Court of Human Rights) designed to retain a flexible degree of national sovereignty within Europe, such as “consistent interpretation,” “consensus,” “margin of appreciation” and “subsidiarity.” Each of these doctrines requires the lawyer and the judge to continuously jump back and forth vertically and horizontally between various overlapping jurisdictions. In addition, there is interplay between European-level and national norms through a general process of harmonization of law within

¹⁰¹⁷ Khadar, *Good Lobby Legal Needs Survey*.

¹⁰¹⁸ Nielsen and Albiston, “Organization of Public Interest Practice,” 1591.

¹⁰¹⁹ Khadar, *Good Lobby Legal Needs Survey*.

¹⁰²⁰ Ibid.

the EU, the incorporation of European human rights law and other international law jurisprudence into EU jurisprudence and vice versa, and the EU policy process, which is informed by constant surveying of national legal systems in various policy areas. As a result, European lawyers (judges, academics, policy makers, legislators, public interest lawyers etc.) need to have strong grounding in comparative law (for both horizontal and vertical comparisons).

The research work that Big Law is undertaking for non-profits typically involves comparing specific laws and legal and administrative practices across multiple jurisdictions. A classic example was provided in Chapter 4, i.e. the work of Clifford Chance with Fair Trials International. Multi-jurisdictional research was carried out by 28 lawyers across 18 of Clifford Chance's European offices into breaches of Articles 5 and 6 of the ECHR, which contributed to the development of three EU directives on the right to translation and interpretation, the right to information during criminal proceedings, and the right to access to a lawyer and communication with a consular official or nominated person. Other examples include those mentioned in Chapter 4, taken from the PILnet global clearinghouse:¹⁰²¹

- “A group of pro bono lawyers gathered research on laws governing squatting in a number of European countries. This information was used to bolster the campaign of an arts NGO advocating for a law permitting the use of derelict buildings for community arts space in Hungary.”
- “In order to strengthen gender equality in Croatia, a human rights NGO partnered up with two leading law firms to look into the implementation of the E.U. Equal Treatment Directive. By examining the approach of other E.U. countries in transposing the directive, the NGO was better equipped to make concrete proposals for improving the gender equality framework in Croatia.”
- “A disability rights organization received an analysis of Swedish laws on guardianship (a model of best practice) from a team of pro bono lawyers. This analysis was used to inform proposals for legislative amendments in Hungary, Slovakia, and the Czech Republic.”

¹⁰²¹ See http://www.pilnet.org/component/docman/doc_download/1-guidelines-for-ngos-how-to-summarize-your-legal-needs.html.

- “When the existing legal framework proved insufficient to protect victims of domestic slavery in France, one NGO looked to pro bono lawyers to help draft proposals to amend the law. These proposals were ultimately used to strengthen the protection available.”

To these examples we might add the Guide on EU Trade Law, prepared for non-profits by Mayer Brown,¹⁰²² the EU Lobbying Toolkits prepared for The Good Lobby by DLA Piper and Dentons.¹⁰²³ More recently, in the context of the closing space for civil society and Brexit, we have seen law firms preparing comparative guides advising NGOs wishing to relocate from jurisdictions like Hungary, Poland or the UK to the Netherlands, Belgium and Germany.¹⁰²⁴

It would seem, therefore, that Big Law Pro Bono in Europe may significantly contribute to access to justice, defined narrowly, insofar as a great deal of the pro bono work is oriented around facilitating non-profits to more effectively engage in or navigate policy, judicial and legislative processes.¹⁰²⁵ However, despite the clear utility of legal research to non-profits, it is also clear that there are pockets of dissatisfaction with services that Big Law provide. Interviews with directors of leading NGOs and IGOs for the purpose of this thesis reveal that some (particularly those with the most experience of making use of law firm pro bono) sometimes “find it difficult to rely on law firms for research as opposed to operational [i.e. corporate] work [as] law firms may lack expertise”¹⁰²⁶ where they are “new to a particular legal area or policy area”¹⁰²⁷ and so it “can be difficult for NGOs to find projects that match up well with what the law firms can produce”.¹⁰²⁸ Where commercial law firms are doing complex research on topics that fall well beyond their core areas of expertise, there does seem to be genuine concern from non-profits. In the words of one interviewee at a leading international organization:

¹⁰²² See: <http://www.a4id.org/wp-content/uploads/2017/06/A4ID-EU-Trade-Guide-FINAL.pdf>.

¹⁰²³ On file with author.

¹⁰²⁴ See the ECNL Handbook on Registering a Civil Society Organization prepared by Dentons and DLA Piper: <http://ecn1.org/publications/handbook-on-registering-a-civil-society-organization/>.

¹⁰²⁵ Of course, the research undertaken for this thesis is not able to conclusively demonstrate that the non-profits being serviced by Big Law Pro Bono in Europe are primarily advocacy or policy oriented, as opposed to service oriented. However, it stands to reason that advocacy and policy oriented non-profits are more likely to require legal research and given that research makes up a large part of Big Law Pro Bono work, it is likely that advocacy and policy non-profits do make up a significant proportion of the non-profit recipients of Big Law Pro Bono in Europe. Another big part of the work, as discussed in Chapter 2, is made of so-called “corporate” work.

¹⁰²⁶ Interview number 48, June 23, 2016.

¹⁰²⁷ Interview number 36, June 13, 2016.

¹⁰²⁸ Interview number 45, June 21, 2016.

“[One] problem is where law firms engage in areas of work where they do not have the expertise built up to take on that work [and] so they are not able to deliver in the way they would have hoped. They may take projects that are particularly interesting or inspiring, and may secure greater engagement from their lawyers but where they do not have expertise in those fields of law, the project will quickly encounter problems and may not be resolved satisfactorily... It may be better to have law firms reviewing contracts, etc. That is what we need and that is what they can do well.”¹⁰²⁹

A particular problem seems to exist in relation to comparative multi-jurisdictional research projects which can prove challenging for firms to coordinate and deliver on. In the words of a non-profit Director with a great deal of experience in making use of pro bono for such projects:

“[Comparative] research projects may require from the law firm a set of skills and a manner of coordinating work that the law firm does not have [or] is not used to. Law firms are not always so successful at coordinating people [and] some law firms should refrain from such projects if they are not able to treat them as fee-earning projects... Law firms may even push for multi-jurisdictional, comparative projects simply to get as many lawyers and offices involved as possible. But this does not mean lawyers are used to working in this manner especially on a pro bono project.”¹⁰³⁰

The challenging nature of such projects is likely to be exacerbated where the question and purpose of the research has not been very clearly defined at the outset. However, of course, when done well, such research can be highly influential particularly in a litigation setting:

“Comparative multi-jurisdictional research projects may only work when the question is very specific. [For example] comparative law can be very powerful at European courts. But there must be a specific question in mind and a specific purpose such as convincing a court or body of x, y or z. Comparative research should not be pursued out of curiosity. For instance securing a preliminary reference is much easier if you can show differing interpretations of EU law across the Member States... Such projects are

¹⁰²⁹ Interview number 47, June 22, 2016.

¹⁰³⁰ Interview number 48, June 23, 2016.

especially important in [the EU] where you have 28 jurisdictions... How can NGOs find out what the practice is in other jurisdictions? ...NGOs have a crucial role to play in holding Member States to account ... and such projects can play a key role in that respect.”¹⁰³¹

To recap, it was suggested in Chapter 2 that, taking just the top 30 firms, approximately 170,000 pro bono hours and almost €70 million worth of work per year is carried out for somewhere in the region of 1500 non-profits (perhaps the equivalent of a 100-lawyer firm working full-time on pro bono for non-profits). If we note that, as of 2014, there were approximately 1800 non-profits registered in the EU transparency register, then the contribution of Big Law Pro Bono is not insignificant.¹⁰³² Of course, we must also recall that there are likely millions of non-profits active across Europe. However, only a fraction of these will be policy or advocacy organizations.

There remains of course the question of whether increasing or enhancing access to law and lawyers and to the judicial, policy and legislative processes for non-profits is an end in itself or should rather contribute ultimately to the betterment of the lives of real people (the constituents of the relevant non-profits). Again, this is a dilemma that pro bono professionals are aware of. DLA Piper is so concerned about the possible limited social impact of research work that they are undertaking a review of some of the comparative research they have produced in recent years. Stas Kuzmierkiewicz, the Pro Bono Associate responsible for the review, explained that the aim was to explore to what extent large research reports were being used by the non-profit clients who had requested them and actually achieving law or policy reform. The question, Kuzmierkiewicz explained, is “do lawyers give up hundreds of hours to produce reports that sit on shelves? If that is the case, why?”¹⁰³³

3 Wide definition

The central question for the wide definition of access to justice is, ‘*is the administration of justice fair, consistent, impartial, reasonable?*’ This is what Cummings refers to as the “policy”

¹⁰³¹ Interview number 45, June 21, 2016.

¹⁰³² See <http://www.europarl.europa.eu/EPRS/EPRS-Briefing-542170-European-Transparency-Register-FINAL.pdf>.

¹⁰³³ Interview number 33, May 17, 2016.

dimension of public interest law and relates to political inequality or “structural disadvantage” and obstacles or hindrances that prevent certain groups from “advancing collective interests through political channels”.¹⁰³⁴ The focus shifts from the “ease of entry to legal institutions” towards “the nature of the justice they provide”.¹⁰³⁵ Under this definition, we are concerned primarily with making the processes and outcomes more just, fair, equitable. Barriers to access to justice, defined in this way, will be systemic or structural defects in the administration of justice that prevent the conflict resolution, rulemaking or rule enforcement processes from treating certain individuals or groups fairly and from delivering justice to such individuals and/or groups. Such barriers could include, for example, systemic racism, sexism, classism, political bias, authoritarianism or corruption in the rulemaking, rule enforcement or conflict resolution processes. As discussed in Chapter 2, securing access to justice, defined in this way, requires norm change. It requires that the assumed legitimacy underpinning the administration of justice in a relevant political community is questioned or suspended and then reconstituted. Actions promoting access to justice can be both internal (working within the existing process to bring about change) or external (working beyond those processes). Moreover, all such actions must be characterized as indirect (possibly contributing to norm change, in time). This is because norm change is unstructured and happens gradually (over years, decades or even centuries) throughout the whole body of the institutionalized rulemaking, rule enforcement and conflict resolution processes, and consequently such actions cannot be said, by themselves, to conclusively contribute to access to justice. For example, a law reform campaign or impact litigation with the intention of promoting greater equality under the law for same sex couples or non-citizens would constitute internal actions seeking to promote access to justice under this definition. Boycotting an election, or organizing a street protest to the same ends would constitute external actions seeking to promote access to justice.

As discussed in Chapter 3, out of the evolving European legal and institutional context described in the previous section, specific models of public interest advocacy emerged: models epitomized by organizations like INTERIGHTS and the ERRC, models premised on deploying international and comparative law (and increasingly also policy) to exert pressure on national decision makers via regional and international norms and norm generators. This entire model of legal advocacy is oriented around achieving norm change both at the national and

¹⁰³⁴ Cummings, “Pursuit of Legal Rights,” 524.

¹⁰³⁵ Sarat, “Book Review,” 1912.

international levels. In so far as Big Law Pro Bono supports non-profits that engage in this model of advocacy, it may contribute to access to justice defined more widely. For example, as noted in Chapter 4, law firms worked alongside Georgian civil rights NGO, *Identoba*, which was involved in litigation and advocacy to remove a prohibition on gay men donating blood in Georgia. The law firms undertook extensive pro bono legal research into case law from other jurisdictions and the European Court of Human Rights (ECtHR) to supplement the legal argumentation for the litigation and provide a comparative perspective. The litigation to which the research gave support was successful, resulting in the striking down of the ban by Georgia's Constitutional Court in 2014.¹⁰³⁶ The examples set out earlier from PILnet's global clearinghouse are also illustrative; often comparative legal research is used to exert pressure either up (on European policy makers and judicial bodies who will, in turn, apply pressure on national administrations) or down, by using comparative jurisprudence (and the principles of supremacy and coherence of European law along with direct effect) to exert pressure on local administrations to comply with EU and ECHR norms. Another recent example in this vein relates to the *Coman* case recently decided by the Court of Justice.¹⁰³⁷ The Romanian LGBTi advocacy group *Accept* teamed up with White & Case to achieve an important legal judgment at the European Court of Justice in 2017. In *Coman v. Romania*, a team comprised of experienced corporate commercial litigators and Romanian human rights lawyers persuaded the Grand Chamber of the Courts of Justice to hold that the term "spouse" includes same sex spouses of EU citizens for the purpose of freedom of movement and residency rights in the EU.

Of course, we should note that, so far as norm change is concerned, Big Law is significantly limited in relation to the issues that it can engage with due to the possibility for potential and actual, perceived and real conflicts of interest arising (as discussed in Chapter 1). In Europe (as in the US) conflicts become particularly problematic for law firms where NGOs are engaged in fields of advocacy that encroach upon the terrain of traditional commercial clients; environmental justice, consumer protection, financial and economic justice, for example. Additionally, any pro bono work that is likely to bring firms into direct confrontation with states and supranational institutions may also be problematic. There are those within the pro

¹⁰³⁶ Londa Beria, "Constitutional Court in Georgia lifts ban on homosexuals giving blood," *Democracy & Freedom Watch*, July 19, 2014. See <http://dfwatch.net/constitutional-court-in-georgia-lifts-ban-on-homosexuals-giving-blood-10117-26435>.

¹⁰³⁷ *Relu Adrian Coman and Others v. Romania* (C-673/16).

bono community who are skeptical of the reasoning behind commercial conflicts. Garth Meintjes, PILnet President suggests that:

“What firms [sometimes] mean when they say [there is a] conflict is a conflict of a business interest. ‘*My well-paying clients won’t like it if I do this*’. Well, too bad! There are well-paying clients who would not like it if we represent people in Guantanamo, does that mean we should not represent people in Guantanamo because some wealthy corporate client does not want you to? If that is what you are saying then pro bono really is as vacuous as some seem to think it is and is not a potential source of social change. I do not think it is that vacuous, but people who espouse this kind of view, make it so. [We must look for] lawyers who have the courage to stand up for their convictions...”¹⁰³⁸

Another interesting point of view that chimes with the opinion of Meintjes was expressed by Özgür Kahale, Pro Bono Director for Europe at DLA Piper. She believes that firms should “start from the law” rather than from a commercial or political risk perspective. Speaking of DLA’s work with refugees and asylum seekers, she said that DLA leadership had been quick to rubbish ideas that law firms could not get involved in such cases because they were too “political”, “these are people with an international right to claim asylum and we are helping them to claim their rights and it is in [states’] interests to take care of these claims as opposed to trying to resist and ignore [them]” she said. “[At DLA] we question everything... we don’t think restrictively, we always think *why not* and *how*. Our starting point is everything is doable... our starting point is human rights law and ethical responsibility”, she continued.¹⁰³⁹

However, the survey of 21 leading pro bono counsel revealed that just under half of those surveyed agreed (moderately or strongly) with the statement: “Conflicts checks related to pro bono should ideally be strictly legal and not commercial...” and just over half disagreed. It is clear from the interviews conducted that there are many firms which avoid pro bono matters that might in any way be perceived negatively by existing clients and/or prevent the firm from acting for clients in the future.

¹⁰³⁸ Interview number 31, May 12, 2016.

¹⁰³⁹ Interview number 30, Mar. 25, 2016.

We may conclude therefore, as above, that Big Law Pro Bono can potentially make a very small but perhaps not insignificant contribution to access to justice defined in this way, in so far as Big Law works through non-profits to indirectly engage in impact litigation and law reform targeted at norm change. However, the range of issues that firms will be willing to engage on may be significantly circumscribed due to the reluctance of firms to openly promote norm change where commercial clients might perceive this negatively.

4 Other contributions of Big Law Pro Bono?

The suggestion I wish to make here is that a large contribution of Big Law Pro Bono in Europe may relate to objectives that lie beyond access to justice. All the pro bono work that Big Law carries out for non-profits in Europe can be construed as achieving two other objectives:

1. Redistributing resources from Big Law (and the private sector more broadly) towards the non-profit sector (and therefore, ultimately, towards the pursuit of public goods such as healthcare and education); and
2. Providing moral/sentimental education to legal and social elites, sensitizing them to various social and political issues and causes, and therefore possibly, over time, contributing to norm change among such elites.

Ultimately, it could be argued, that all of the 200,000 hours or €85 million worth of pro bono work carried out per year across Europe (among just the top 30 firms), whether related to corporate work for non-profits (contracts, governance, employment advice, etc.), to legal research, training, drafting, fact-finding or lobbying, constitutes a transfer of valuable resources (time/expertise/knowledge) away from the private sector and towards the public sector (non-profits, law clinics, public benefit institutions and even, to some extent, social enterprises). In the same way that certain philanthropic activity, even where donations are primarily made to non-profits, could arguably be characterized as a form of wealth distribution, we might argue that, where the non-profit pro bono recipients are running programs or pursuing agendas promoting social and economic equality, Big Law Pro Bono could be construed as redistributive, whether in terms of expertise and know-how or wealth (although, of course, significant data would be needed to empirically demonstrate this).¹⁰⁴⁰ Indeed, some in the

¹⁰⁴⁰ Wolpert, “America’s private foundations,” 123–49.

European Big Law Pro Bono community do think of pro bono as a democratization or redistribution of specialist legal expertise. Meintjes' central concern is that pro bono should have, as its core aim, transformative social change, by which he means change in the way that law works in society and the results it produces for those with power as compared to those without power:

“Pro bono gives you access to expertise within the legal profession that you would not otherwise have; know-how about tax, trade, extractives, mining and environmental codes. [Law firms] have been developing that expertise on behalf of very well-paying clients and now you [can make] that available to civil society who can [consequently] engage in high-level policy discussions that they would otherwise be excluded from.”¹⁰⁴¹

He continues:

“The mainstream legal profession has grown and benefited from free market thinking at a global level. This has made them fantastically wealthy and encouraged them to open offices all around the world and to add staff and to grow. [However, sometimes] the way in which law is being practiced, is skewing outcomes in ways that further the interests of [the] rich and powerful... rather than a broader community and public... we cannot deny that the way law is practiced globally does not produce results that benefit everyone equally. It's not nearly helping everyone and may be part of the rapid acceleration of inequality. It may be fueling disruptive consumption and resource depletion, which would happen less if law were more evenly available as a social process. If you could get equal levels of policy expertise on all sides of a policy issue, you could likely produce outcomes that were much more equitable, responsible and sustainable.”¹⁰⁴²

Meintjes argues that by placing commercial law firms at the service of the public (both civil society, public benefit institutions, and even the state), not merely as a source of “man power”

¹⁰⁴¹ Interview number 31, May 12, 2016.

¹⁰⁴² Ibid.

but as a source of *expertise*, law firms can radically alter the distribution of law and thus power in society.

A second alternative objective Big Law Pro Bono could be construed as advancing is moral or sentimental education of social and professional elites. Commercial law firms in Europe are packed full of social and cultural elites. The largest firms have intensely competitive recruitment processes that are geared towards the filtering out of non-elites and the identification of young lawyers with “compatible” social and cultural capital.¹⁰⁴³ All young recruits in continental Europe will have graduated towards the top of their class, will speak at least two languages fluently, will have at least one LLM (and very often more than one), and will most likely have spent time studying abroad.¹⁰⁴⁴ International law firms are increasingly identifying a set of common characteristics and credentials that define the ideal recruit; a ‘global lawyer’, multilingual, internationalized, cosmopolitan and thoroughly polished. In the UK, consortiums of large law firms, each taking on up to 100 trainee lawyers a year, have come together to develop their own “accelerated” legal practice course (the accelerated LPC) which all of their recruits are required to undertake.¹⁰⁴⁵ Similarly, in the Netherlands, 14 large firms came together to create the “Law Firm School” in 2009 to provide vocational training to their recruits.¹⁰⁴⁶ These training programs have been devised to provide, in tandem with the apprenticeship period they are linked to, an extensive socialization period for young commercial lawyers. The sponsoring firms also seek to make the vocational stage of legal education (for their recruits) more relevant to commercial law practice.

The selective recruitment process combined with the extended socialization process will most likely result, without further intervention, in a very narrow and elite class of individuals occupying the glass tower European offices of the globe’s largest law firms.

Richard Rorty has argued in favor of “sentimental education”, to create a “planetary community” dominated by a culture of human rights.¹⁰⁴⁷ Such education is rooted in an understanding of moral progress as a “progress of sentiments”; a progress that “consists in an

¹⁰⁴³ Cook, Faulconbridge, and Muzio, “London’s legal elite,” 1744–62.

¹⁰⁴⁴ Maduro, “Legal Education,” editorial note.

¹⁰⁴⁵ See, for example, Freshfields Bruckhaus Deringer, Herbert Smith Freehills, Hogan Lovells, Norton Rose or Slaughter and May; <http://www.bpp.com/accelerated-lpc> (25/11/2015).

¹⁰⁴⁶ Wilson, “Practical Training in Law,” 178–79; see also <http://thelawfirmschool.nl/>.

¹⁰⁴⁷ Rorty, “Human rights, rationality, and sentimentality,” 178.

increasing ability to see the similarities between ourselves and people very unlike us as outweighing the differences”¹⁰⁴⁸. Rorty suggests that, to get “whites to be nicer to blacks, males to females, Serbs to Muslims, or straights to gays”, we must appeal to people’s sentiments and encourage them to “think about what things might be like for people with whom [they] do not immediately identify”.¹⁰⁴⁹ The purpose of sentimental education is to answer the question: “Why should I care about a stranger, a person who is no kin to me, a person whose habits I find disgusting?”¹⁰⁵⁰

However, Rorty notes that sentimental education renders liberal elites the engine of moral progress. It means that our “hope for a decent society consists in softening the self-satisfied hearts of a leisure class”. He notes that:

“[...] if we hand our hopes for moral progress over to sentiment, we are in effect handing them over to condescension. For we shall be relying on those who have the power to change things — people like the rich New England abolitionists or rich bleeding hearts like Robert Owen and Friedrich Engels — rather than relying on something that has power over them. We shall have to accept the fact that the fate of the women of Bosnia depends on whether television journalists manage to do for them what Harriet Beecher Stowe did for black slaves - whether these journalists can make us, the audience back in the safe countries, feel that these women are more like us, more like real human beings, than we had realized.”¹⁰⁵¹

Rorty suggests that, however uncomfortable we may be with this idea, this is how moral enlightenment *is* achieved; moral progress is, after all, a story of “powerful people gradually ceasing to oppress others, or to countenance the oppression of others”.¹⁰⁵²

It could be argued that Big Law Pro Bono, even where pro bono work is carried out exclusively for non-profits, is a form of sentimental education. It is an education that consists in sensitizing European elites to a range of public interest causes largely rooted in human rights values. Europe’s advocacy, human rights and public interest NGOs deal in a broad array of substantives issues. The survey of 100 policy NGOs in the transparency register revealed a

¹⁰⁴⁸ Ibid., 181.

¹⁰⁴⁹ Ibid., 178–85.

¹⁰⁵⁰ Ibid., 185.

¹⁰⁵¹ Ibid., 181.

¹⁰⁵² Ibid.

diverse range of focuses: health (14%); the environment (14%); education and children (14%); migration and asylum (9%); economic and social justice (7%); civic engagement (6%).¹⁰⁵³ Through working directly with non-profits across Europe, the elites that make up the rank and file of Big Law are exposed to individuals and ideas that challenge them to identify with causes with which they might not otherwise identify (Roma rights, migrant rights, gay rights, etc.). Of course, as suggested by Nicolas Patrick above, were pro bono practice to bring lawyers directly into contact with asylum seekers, victims of abuse and discrimination and so on, it would no doubt increase the power of this moral education significantly. However, this is already happening in innovative ways that do not involve direct legal representation. For example, DLA Piper established a legal education program for asylum seekers and refugees, which is being run across its European offices. The program engages lawyers in providing legal training to participants on areas of law relevant for integration, (small business law, health law, housing law, etc.).¹⁰⁵⁴

In any event, in this way, Big Law Pro Bono perhaps operates as a corrective against the tendency towards a closed and elitist culture among Europe's richest and most powerful lawyers. Particularly if we assume an average participation rate (in pro bono work), at the top firms, of 50% (as discussed in Chapter 4), the impact of this kind of education on the culture of a large firm may not be insignificant.

5 Conclusion

In this final Chapter of the thesis, we have set out to evaluate the extent to which Big Law Pro Bono contributes to access to justice in Europe, where "access to justice" is defined along the lines set out in Chapter 2, in three different (but overlapping) ways.

The problem that we have had to grapple with in this thesis is that, if we embrace the definition of access to justice that has been embedded within much of the existing literature on pro bono (i.e. access to justice as the provision of (civil) legal aid to low-income individuals), then we must conclude that Big Law Pro Bono in Europe does not contribute to access to justice and possibly is not even worthy of academic attention. Therefore, we have developed a broader

¹⁰⁵³ Khadar, *Good Lobby Legal Needs Survey*.

¹⁰⁵⁴ See <https://www.dlapiper.com/en/germany/news/2017/09/dla-piper-launches-first-of-its-kind-legal-program/>.

definition of access to justice in the hope that this will help us to critically evaluate Big Law Pro Bono and its empirical contributions to access to justice beyond the provision of civil legal aid and that it might allow us to expand the normative agenda for Big Law Pro Bono in Europe beyond the provision of civil legal aid.

In this Chapter, it has been suggested that in relation to the definition of access to justice currently embraced by the US pro bono literature (the PBL definition), Big Law Pro Bono does not contribute to access to justice insofar as possibly less than 15% of Big Law Pro Bono work involves providing legal services directly to low-income individuals.

In relation to what has been termed the “narrow definition” of access to justice (i.e. directly or indirectly facilitating access to the conflict resolution, rulemaking or rule enforcement processes) much of the work that firms do in Europe for non-profits falls under this definition. This is because several developments within European law and governance, since the Second World War and more recently, have made it increasingly complicated and resource-intensive for civil society organizations to effectively engage with European policy and adjudicatory bodies and have threatened their very existence by undermining core civil liberties, and Big Law Pro Bono facilitates non-profits to cope with both of these challenges.

In relation to the “wide definition” of access to justice, it has been suggested that Big Law Pro Bono makes (or can make) a small but significant impact. The models of social change lawyering that emerged from the civil liberties, human rights and public interest law movement in Europe have become significantly institutionalized in contemporary European civil society organizations (particularly those operating transnationally). These models of legal advocacy promote law reform and policy change and rely on deploying European and international norms domestically to promote progressive norm change or applying progressive national norms comparatively to promote norm change in specific jurisdictions. In either case, actors engaged in this kind of advocacy (i.e. non-profits across Europe) have been effectively making use of Big Law Pro Bono to increase their capacity for research and advocacy (in particular, comparative, multi-jurisdictional legal research). In this way, Big Law Pro Bono in Europe also contributes to, and stands to contribute to, access to justice in this definition.

Finally, beyond access to justice, it has been suggested that Big Law Pro Bono in Europe might also stand to make a contribution. This insofar as all the Big Law Pro Bono work carried out

in Europe could be characterized as a redistribution of resources away from wealthy private sector clients and towards public interests and public goods. Moreover, through Big Law Pro Bono, the increasingly large number of elite lawyers that are engaged in pro bono through their firms are also receiving a form of moral education by being exposed to various public interest and human rights related causes that they might otherwise have been insulated from.

CONCLUSION

The central objective of this thesis has been to explore whether “Big Law Pro Bono” contributes to access to justice in Europe and, if not, whether normatively, it could. The central argument has been that Big Law Pro Bono, as a practice and institution, has taken a unique shape in Europe, which is markedly different from the shape of its American predecessor. Chiefly, this distinction can be observed in the nature of the clients (typically NGOs rather than low-income individuals) and in the objectives pursued (often law reform or policy change rather than promoting individual access to justice). The result is that Big Law Pro Bono in Europe does not contribute to access to justice as this phrase has been classically understood in the literature. In order to fully perceive the way in which Big Law Pro Bono, as a resource, has been deployed in Europe, we need to adopt a much broader and more nuanced definition of access to justice (essentially redefining the objectives of pro bono and the criteria for evaluation of success). When evaluated on the basis of such a (broader) definition, we can perceive that Big Law Pro Bono might contribute to access to justice in Europe by promoting the legal and policy work of NGOs, by enabling them to better access legal services and by exposing otherwise quite elitist and insulated European commercial lawyers to the important public interest causes pursued by those organizations.

To recap, in Chapter 1 we established that Big Law Pro Bono could trace its origins to the United States and to progressive legal movements of the 1960s and 1970s and we suggested that, as such, it must be understood as a fundamentally American construct. I suggested that it was only by the internationalization of large and elite law firms that Big Law Pro Bono came to be practiced in Continental Europe at all. We also suggested that Big Law Pro Bono, unlike other forms of progressive lawyering was, at least before significant institutionalization, ideologically indeterminate and rooted in conventional professional services norms. An exploration of how Big Law Pro Bono was institutionalized in the US between the 1970s and the early 2000s revealed that Big Law Pro Bono may also be historically and politically contingent, taking shape against the prevailing social and political climate. Several important consequences and implications of these findings were suggested. Firstly, just because Big Law Pro Bono took a certain shape in the United States and was oriented functionally towards the provision of civil legal aid in that context, we cannot take for granted, without further exploration, that it will take the same shape when transplanted beyond the United States.

Secondly, the shape that Big Law Pro Bono has taken in the US, has influenced the orientation of the literature which empirically and normatively conceives of Big Law Pro Bono as a solution to the justice gap (meaning civil legal aid). This presents further gaps in the existing literature, in terms of exploring how else Big Law Pro Bono is and might be constructed, i.e. which ends it might serve, beyond providing civil legal aid.

In Chapter 2, in addition to setting out the methodological approach adopted throughout the thesis research period (i.e. interviews, desk-based research, archival research, participant observation and surveys), we developed a definition of access to justice that aimed to serve a handful of different purposes. Firstly, it incorporated and moved beyond the narrow definition of access to justice typically employed in the pro bono literature which revolves around increasing the availability of civil legal aid. Secondly, it responded to criticisms of such narrow conceptions of access to justice by including both procedural and substantive elements and by looking beyond the legal system to embrace broader political notions of distributive justice. Thirdly, it provided an evaluative framework for Big Law Pro Bono in Europe and thus facilitated an assessment of the extent to which this practice contributes to access to justice. Fourthly, it provided an expanded normative project for Big Law Pro Bono in Europe and elsewhere. The definition commenced from the work of John Rawls and everyday or intuitive understandings of access to justice. The objective was to create a number of broad overlapping definitions that could accommodate a multi-layered evaluation of the Big Law Pro Bono work being carried out in Europe.

In Chapter 3, based on a broad and loose definition of “pro bono” developed in Chapter 2 (i.e. *“legal work undertaken for the public good, at below market rates, for recipients who: cannot afford to pay; due to the scarcity of financial resources or the limited value placed on the relevant legal services relative to other goods and services, would not pay; or would otherwise not be able to source such services elsewhere on the open market.”*), we explored the historical background context of pro bono lawyering in Europe. In doing so, we concluded that the factors that play a role in shaping and re-shaping the legal profession and the provision of legal services, were also likely to play a role in shaping the practice of pro bono. We suggested that the degree of sophistication of pro bono practice likely corresponded to the degree of complexity of the practice of law, the number of practice sites and areas of social life upon which it is applied and consequently the variety of ways in which law impacts the average citizen. We noted that the rationales for pro bono had changed throughout the ages,

from communal solidarity, civic duty, kinship and patronage and aristocratic honor in Ancient Athens and Republican Rome, to charitable and professional duty and social contract theory in the Middle Ages, Early Modern Era and 20th Century. Nevertheless, we observed that there has been a consistent and growing concern with access to justice, defined narrowly as the access of the poor and the needy to legal services and to procedures for administering justice. We suggested that access to justice, defined in this way, had been the major objective of pro bono practice throughout the ages in Europe. It was noted that, with the emergence of nation states and then the European social welfare state, the obligation of ensuring access to justice gradually shifted from a charitable or professional duty of lawyers and the organized bar, towards a constitutionalized civic right, institutionalized in the form of state-funded legal aid systems. Finally, we explored how novel models of social justice lawyering emerged in the late 20th Century, which both embraced and transcended conventional public service norms (neutrality, impartiality) that were implicit in much of the pro bono lawyering practice throughout European history, and fused them with both human rights frames and political and transgressive ideologies that had been cultivated in Soviet-era Central and Eastern Europe. Broadly, they pursued the wide conception of access to justice (as defined in Chapter 2) insofar as they sought norm change, altering both the processes and outcomes of existing judicial mechanisms, and so redefining “justice” in favor of marginalized and underrepresented groups and social and political pariahs.

In Chapter 4, we explored the process by which Big Law Pro Bono began to emerge in Europe, by way of its institutionalization in the US and London and the emergence of a global corporate bar and a professional class of pro bono managers with mandates to spread pro bono culture across the increasing number of international offices of their respective firms. We also sketched the shape of Big Law Pro Bono in Europe, which was one of weak institutionalization mimicking many of the features of pro bono in the US, however, with at least one major difference, the virtually exclusive non-profit client base both from the point of view of the firms and the clearinghouses/intermediaries. We noted that, taking just the top 30 law firms, the European Big Law Pro Bono industry likely involves more than 5000 lawyers (perhaps 120 full-time equivalents) doing some €85 million worth of pro bono work per year spanning the entire continent from Moscow to London. While some 1500 non-profit clients may benefit from this work, likely less than 15% of this work (possibly much less) is focused on access to justice, as defined in the existing pro bono literature and within US pro bono circles (i.e. direct access to justice for individual clients). Moreover, we observed that an entire infrastructure has

emerged, operating both internationally and nationally, to connect Big Law with non-profits spread across the Continent, with virtually no focus on the provision of legal services to low-income individuals. We noted that, at first glance, this seemed odd, given that, as explored in Chapter 2, the singular objective that tied together the various models of pro bono engaged in by the European legal professions over the centuries, has been, precisely securing access to justice for individuals.

In Chapter 5, we explored why this was the case. The analysis pointed to several possible answers, including: barriers to market access experienced by the initial Big Law Pro Bono entrepreneurs in Europe (i.e. full-time pro bono managers based in New York, DC and London); the unique profile and networks of those actors who initially developed the market for Big Law Pro Bono in Europe (especially PILnet); the legacies of the European civil liberties, human rights and public interest law movements; the resistance of local bars to Big Law engaging in individual client work; the specificities of the type of law firms and lawyers that make up the European Corporate Bar; the relative ease of dealing with non-profit clients as opposed to individual clients; the functional distribution of labor between the Social Bars of Europe and the rest of the legal profession (and the Corporate Bar in particular); and the fact that the problem of individual access to justice (in Central and Eastern Europe) had, in the minds of many of the relevant stakeholders, already been largely solved by the time the market for Big Law Pro Bono was really taking shape on the Continent (settling on a UK/Dutch inspired state-funded model rather than the US pro bono dependent model). Nevertheless, it was also conceded that recent developments in the United Kingdom in particular, and across the rest of Europe more broadly, related to both legal aid systems and Big Law Pro Bono practice, leave open the possibility that the current status quo may be revised in the coming years. That is to say that we might, in time, witness a reorientation of Big Law Pro Bono practice in Continental Europe towards the provision of legal services for low-income individuals. It was suggested that, in spite of the strong orientation of the US model of Big Law Pro Bono towards promoting a narrow vision of access to justice, as a globalized resource, there is no reason to think that it should necessarily maintain this functional orientation when transplanted into new legal and political contexts. We concluded that the process of localization had the power to transform and re-purpose Big Law Pro Bono. While the internal organization remains broadly the same as in the US (involving the development of pro bono policies, the setting of pro bono targets, the establishment of pro bono committees and the appointment of full-time pro bono professionals engaging fee-earning lawyers in working for free), the ends to which the resource

is deployed may differ. Big Law Pro Bono in Europe primarily involves the provision of free legal services (chiefly research and operational support) to non-profit organizations that are broadly pursuing norm change via law reform and policy advocacy work. This is an altogether different objective to promoting access to justice for low-income individuals. Also in light of the recent changes underway in the UK, we concluded that Big Law Pro Bono in Europe appeared to be an ideologically indeterminate and historically contingent resource that was taking shape against the evolving political and legal landscape. As in the US, the prevailing legal and political context and the key actors in the pro bono ecosystem (internal and external to the firm) are playing a decisive role in determining how Big Law Pro Bono is being institutionalized in Europe. In particular, intermediary organizations, the organized bar (although through resistance rather than support), the legacy of the civil liberties, human rights and public interest law movements, the prevailing systems of state-funded legal aid and the large population of non-profit organizations engaging in law reform and policy advocacy work targeted at the European Union and Council of Europe institutions, have all played a role in giving a unique shape to Big Law Pro Bono in Europe.

Finally, in Chapter 6, we set out to evaluate the extent to which Big Law Pro Bono contributes to access to justice in Europe, where “access to justice” was defined along the lines set out in Chapter 2, i.e. in four different (but overlapping) ways. It was suggested that in relation to the definition of access to justice currently embraced by the US pro bono literature, Big Law Pro Bono does not contribute to access to justice insofar as possibly less than 15% of Big Law Pro Bono work involves providing legal services directly to low-income individuals. In relation to what was defined as the “narrow definition” of access to justice (i.e. directly or indirectly facilitating access to the conflict resolution, rulemaking or rule enforcement processes), it was suggested that much of the work that firms do in Europe for non-profits falls under this definition. It was posited that this was because several developments within European law and governance, since the Second World War and more recently, have made it increasingly complicated and resource-intensive for civil society organizations to effectively engage with European policy and adjudicatory bodies (in other words, as noted in Chapter 3, increased complexity of the practice of law will create new pro bono needs within society - unmet legal need) and have threatened their very existence by undermining core civil liberties, and Big Law Pro Bono facilitates non-profits to cope with both of these challenges.

In relation to the “wide definition” of access to justice, it was suggested that Big Law Pro Bono makes (or could make) a small but significant impact. It was noted that the models of social change lawyering that emerged from the civil liberties, human rights and public interest law movement in Europe have become significantly institutionalized in contemporary European civil society organizations (particularly those operating transnationally). These models of legal advocacy, I argued, promoted law reform and policy change and rely on deploying European and international norms domestically to promote progressive norm change or on applying progressive national norms comparatively to promote norm change in specific jurisdictions. In either case, actors engaged in this kind of advocacy (i.e. non-profits across Europe) have been effectively making use of Big Law Pro Bono to increase their capacity for research and advocacy (in particular, comparative, multi-jurisdictional legal research). In this way, Big Law Pro Bono in Europe also contributes to, and stands to contribute to, access to justice within this definition.

Finally, beyond access to justice, it has been suggested that Big Law Pro Bono in Europe might stand to make a significant contribution. This insofar as all the Big Law Pro Bono work carried out in Europe could be characterized as a redistribution of resources away from wealthy private sector clients and towards public interests and public goods. Moreover, through Big Law Pro Bono, the increasingly large number of elite lawyers who are engaged in pro bono through their firms are also receiving a form of moral education by being exposed to various public interest and human rights related causes that they might otherwise have been insulated from (e.g. environmental protection, minority rights, poverty eradication, migrant rights, etc.).

Ultimately, it is hoped that this thesis has shed light on the study of progressive lawyering in Europe and specifically large firm pro bono practice, its globalization and localization and the role of various stakeholders in this process. As noted in the introduction, between 1980 and the early 2000s, McDonalds was opening its first branches in most European countries. This was exactly the period when global (mainly US) law firms were doing the same. McDonalds was not only exporting hamburgers and fries, it was exporting Americana: American culture and practices (fast food, fancy packaging and drive-thrus, just like in the movies). Similarly, as law firms were seeking to provide legal services around the globe, they were also spreading American practices and ideals, such as large firm pro bono. While the success of McDonalds is often attributed to its consistency, the success of Big Law Pro Bono may in fact depend on its adaptability to the local context. Even McDonalds now serves a “McKroket” in the

Netherlands, the “McNürnburger” in Germany and the “Croque McDo” in France. The questions that remain open are what impact this process of localization will have, over the long run, on the overall practice and its sustainability. Working for NGOs can be repetitive and not necessarily rewarding in the same way as working for real people. It is often very similar to the work that commercial lawyers do in their fee-earning practice. While some find this comforting, others find it mundane. In addition, NGOs have the tendency to make “would be nice to have” pro bono requests rather than “absolutely necessary” pro bono requests (especially where these relate to law and policy advocacy and research to support this work). Lawyers become disengaged with such work that sometimes feels contrived, like “busy work”. This combined with the fact that lawyers sometimes work in areas where they have no expertise (international human rights, for example) results in low quality output, which has the tendency to erode trust in pro bono over the long run. In addition, without significant penetration of local legal markets (a critical mass of local lawyers managing pro bono on a full-time basis across Europe and fee-earners looking to do such work) it is questionable how sustainable this legal transplant will actually be. To this end, future research might investigate the factors contributing to success or failure in law firm-NGO relationships/partnerships, factors affecting lawyer motivation and satisfaction in working for NGO clients, perhaps in comparison to work for non-profit clients.

Other leads that could be followed up on include: comparative empirical research into the links between declining legal aid budgets and pressures on legal aid systems (and the political discourse that surrounds that) and steps taken by commercial law firms to increase their pro bono work; the extent to which pro bono practices may incentivize elite law students (beyond the US) to seek out job opportunities at specific law firms; the link (if any) between threats to the legal profession as a whole (especially in terms of competition from non-legal service providers) and the pro bono activity of large firms outside of the US; what is leading firms to appoint full-time pro bono managers beyond the US, and why some firms adopt such a strategy while others refrain from doing so and what impact such persons are making/can make (both within the firm and beyond the firm) where they may be the only full-time professional in an entire jurisdiction?

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